MISSISSIPPI LAW JOURNAL

ARTICLES

Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions
Jim Fraiser

A Review of Mississippi Law Regarding Arbitration
Corey D. Hinshaw and Lindsay G. Watts

COMMENTS

Looking For Comity in the Habeas Corpus World: The Suspension Clause in Relation to the AEDPA as Amended By the USA Patriot Act

Eliminating Injustice: Revising Mississippi's Statutory Rape Laws

BOOK REVIEWS

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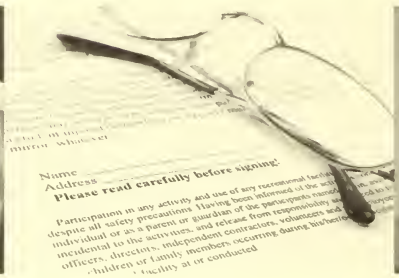

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TABLE OF CONTENTS

ARTICLES

RECENT DEVELOPMENTS IN MISSISSIPPI TORT CLAIMS ACT LAW PERTAINING TO NOTICE OF CLAIM AND EXEMPTIONS TO IMMUNITY ISSUES: SUBSTANTIAL/STRICT COMPLIANCE, DISCRETIONARY ACTS, POLICE PROTECTION AND DANGEROUS CONDITIONS
. . . . . *Jim Fraiser* 973

A REVIEW OF MISSISSIPPI LAW REGARDING ARBITRATION
. . . . . *Corey D. Hinshaw and Lindsay G. Watts* 1007

COMMENTS

LOOKING FOR COMITY IN THE HABEAS CORPUS WORLD: THE SUSPENSION CLAUSE IN RELATION TO THE AEDPA AS AMENDED BY THE USA PATRIOT ACT
. . . . . *Kathryn E. Wetherbee* 1045

ELIMINATING INJUSTICE: REVISING MISSISSIPPI'S STATUTORY RAPE LAWS
. . . . . *Alexandra Hutton Oglesby* 1067

BOOK REVIEWS

MISSISSIPPI WORKERS' COMPENSATION: MISSISSIPPI PRACTICE SERIES
By: John R. Bradley and Linda A. Thompson
Thomson/West, 2006
. . . . . *John Griffin Jones* 1101

DAMAGES LAW FOR MISSISSIPPI TRIAL PRACTICE
Scranton Publishing (2006) – $298.00
. . . . . *Alysson Mills* 1111

RECENT DEVELOPMENTS IN MISSISSIPPI TORT CLAIMS ACT LAW PERTAINING TO NOTICE OF CLAIM AND EXEMPTIONS TO IMMUNITY ISSUES: SUBSTANTIAL/STRICT COMPLIANCE, DISCRETIONARY ACTS, POLICE PROTECTION AND DANGEROUS CONDITIONS

Jim Fraiser[*]

I. INTRODUCTION

This article examines recent developments and the current status of Mississippi law concerning certain key issues related to what is commonly referred to as the Mississippi Tort Claims Act.[1] This review includes decisions by the Mississippi Supreme Court, the Mississippi Court of Appeals, and

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[*] B.A. 1976, J.D. 1979, The University of Mississippi. After serving as the Hinds County, Mississippi, Assistant District Attorney (1980-1982) and with Fraiser Law Offices (1983-2000), Jim Fraiser served as Mississippi Special Assistant Attorney General (1995-2000), Director of Choctaw Legal Defense (2000-2004), and as an associate with the firm of Page, Mannino, Peresich & McDermott, PLLC (2004-2006) defending against and asserting claims under the purview of Mississippi's Tort Claims Act in all state and federal trial and appellate courts. He has authored three previous articles for the Mississippi Law Journal and eleven articles for ALR 5th and ALR Fed, many of which concern tort claims act law. He currently serves as a federal administrative law judge for the Social Security Administration in Tupelo, Mississippi. He is also a professor of law at Mississippi College Law School and the author of three novels and seven nonfiction books about the history, culture and architecture of the Deep South. The opinions expressed in this article are those of the author only and not necessarily those of his employer.

[1] MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 2005). This statute is also known as the Mississippi Governmental Immunity Act.

Mississippi's federal courts, as well as decisions published in other jurisdictions interpreting key issues of statutory tort claims act schemes similar to Mississippi's, which demonstrate the evolving nature of Mississippi Tort Claims Act judicial interpretation, with emphasis on the key issues of what constitutes sufficient notice of claim, and the scope of immunities conferred upon governmental entities by the discretionary, police protection, and dangerous condition exemptions.

II. JUDICIAL HISTORY OF MISSISSIPPI'S TORT CLAIMS ACT

The principle of sovereign immunity was concisely expressed in the ancient maxim, "the King can do no wrong." The English began eroding this concept in medieval times with various documents that include the *Magna Carta*. However, the maxim's rationale probably served as the philosophical basis for sovereign immunity in the United States of America.[2] Congress partially abrogated sovereign immunity with its passage of the Federal Tort Claims Act,[3] through which it allowed plaintiffs to bring certain tort actions against the government pending their exhaustion of administrative remedies and compliance with various procedural requirements.[4]

The Mississippi Supreme Court demanded an end to sovereign immunity in 1982,[5] and the Mississippi legislature enacted a Sovereign Immunity Act in 1983, but did not enact provisions that ended full immunity until after the state's highest court declared the legislature's stalling to be unconstitutional.[6]

Finally, in 1993, the legislature partially abrogated sovereign immunity, subject to (1) claimants' exhaustion of administrative remedies where required;[7] (2) filing of notices of

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[2] *See* Jones v. Knight, 373 So.2d 254, 259 (Miss. 1979) (Bowling, J., dissenting) (attributing history of American sovereign immunity to English common law).

[3] 28 U.S.C. § 2675 (2000).

[4] *Id.*

[5] Pruett v. City of Rosedale, 421 So.2d 1046, 1052 (Miss. 1982) (en banc).

[6] Presley v. Miss. State Highway Comm'n., 608 So.2d 1288, 1301 (Miss. 1992) (en banc).

[7] MISS. CODE ANN. § 11-46-11(1) (1994).

claim 90 days prior to instituting suits against the state and its agencies or any political subdivisions such as counties or municipalities;[8] and (3) numerous exemptions, which provided that, regardless of the negligence of governmental officials and employees, governmental entities would not be held liable in certain situations, such as when their employees acted within their discretion whether or not their discretion was abused,[9] when they acted in the course of providing police protection, and when a dangerous condition existed on the property of a governmental entity that was not created or caused by the entity or of which the entity had no notice and timely opportunity to repair or warn against .[10]

Mississippi's appellate courts reacted to the new Act in a manner quite predictable in light of American tort claims act history. As I noted years earlier in a law journal article[11] analyzing the Mississippi Tort Claims Act:

> [T]he national trend in the sovereign immunity milieu involved an early conservative view of recovery subsequent to the various states' waiver of sovereign immunity, followed by a more liberal recovery-favoring policy in response to the unfairness to injured citizens occasioned by strict statutory construction of notice and exemption statutes. The most recent movement is back towards a middle-ground construction designed to establish both a reasonable recovery for injured citizens and to appropriately limit diminution of already scarce governmental financial resources.[12]

In short, I believed I had detected a pattern of judicial interpretation of tort claims act statutes in other states that would be repeated by our courts. Initially, our courts assuaged governmental concerns about the sudden loss of limited state

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[8] *Id.*

[9] MISS. CODE ANN. § 11-46-9(1)(d) (1994).

[10] MISS. CODE ANN. § 11-46-9(1)(v) (1994).

[11] *See* Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703 (1999).

[12] *Id.* at 860.

and local funds by limiting claimants' recoveries via strict interpretations of the claim notice[13] and exemption provisions of the new Tort Claims Act. Subsequently, when it became apparent that the government would not suffer unduly from the payment of legitimate claims thanks in part to the Tort Claims Act's cap on damages,[14] and that claimants were losing recoveries because of draconian enforcement of the Act's notice and exemption provisions, certain rules were relaxed, including the shift from strict compliance with claim notice provisions to substantial compliance therewith.[15] In time, after both the damage cap[16] and the number of adverse judgments increased, our courts shifted once again, moving back towards a middle-ground view of several key issues. In this article, I will attempt to both demonstrate our courts' shifts in perspective regarding these issues, and discuss the direction our courts may take in future decisions under the auspices of the Mississippi Tort Claims Act.

III. NOTICE OF CLAIM

Mississippi's notice of claim statute has two principle parts. Mississippi Code Section 11-46-11(1) contains a tolling period between the service of notice and the filing of suit. Subsection (2) provides the factual information and method of service and delivery required for the claim notice. As will be discussed hereafter, there has been significant shifting by our courts as to what constitutes adequate compliance with these two separate provisions.

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[13] *See, e.g.,* City of Jackson v. Lumpkin, 697 So.2d 1179, 1181 (Miss. 1997) (deciding that plaintiffs must strictly comply with the claim notice requirements of 11-46-11).

[14] MISS. CODE ANN. § 11-46-15(1), (2) (1994) (allowing then a maximum of $250,000 for all claims arising out of a single occurrence. The cap has since increased substantially by drafted-in provisions that increase it with the passage of time).

[15] Reaves ex rel. Rouse v. Randall, 729 So. 2d 1237, 1240 (Miss. 1998).

[16] The amount initially increased to $500,000 for each occurrence. *See* MISS. CODE ANN. § 11-46-15(1) (1994).

In its landmark decision of *City of Jackson v. Lumpkin*,[17] the Mississippi Supreme Court ruled that strict compliance with the notice provisions of Missississpi Code Section 11-46-11 was a mandatory jurisdictional requirement.[18] Citing my law journal article[19] in support of their rationale, the court declared that our "[l]egislature's choice of mandatory, condition precedent language [i.e., that claimants 'shall' file a presuit notice of claim] suggests an intent to require strict compliance with the notice of claim provisions and a directive to the court to disallow substantial compliance."[20]

This ruling led to a rash of decisions that upheld circuit court dismissals of actions where plaintiffs had failed to strictly comply with the mandatory jurisdictional claim notice provisions of the statute.[21] In other words, any notice of claim was potentially insufficient that did not address each of the seven required notice factors of Mississippi Code Section 11-46-11(2):

> (1) notice in writing; (2) sent by registered or certified mail or delivered in person; (3) containing a short and plain statement of the facts regarding the circumstances of the injury; (4) giving the extent of the injury; (5) providing the names of all persons involved; (6) listing the damages sought; and (7) citing the residence of the plaintiff.

Upon finding that the requirement of strict compliance with the statute was "very difficult to comply with",[22] the Mississippi Supreme Court subsequently abandoned strict compliance in its landmark decision, *Reaves v. Randall, ex rel*

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[17] 697 So. 2d 1179, 1181 (Miss. 1997).

[18] *Id.* at 1182.

[19] J. James Fraiser III, *A Review of Issues Presented by Section 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations*, 65 MISS L. J. 643, 650 (1996).

[20] *Lumpkin*, 697 So. 2d at 1182 n.1 (quoting J. James Fraiser III, *A Review of Issues Presented by Section 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations*, 65 MISS. L.J. 643, 650 (1996)).

[21] *See, e.g.*, Carpenter v. Dawson, 701 So. 2d 807 (Miss. 1997) (holding a two sentence letter to a city adjuster was insufficient notice of a claim).

[22] See the Mississippi Supreme Court's belated explanation in *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006).

Rouse.[23] In *Reaves*, the court declared that substantial compliance with the "simple requirements" of the notice statute would be sufficient to grant the trial court jurisdiction over the case.[24] Any questions about the court's intent were resolved in the decision of *Carr v. Town of Shubuta*,[25] which asserted the proposition that substantial compliance with the condition precedent information requirement of Section 11-46-11 was all that the statute required.[26] The court further defined substantial compliance by stating that substantial compliance was that which "informs the entity of the claimant's intent to make a claim and contains sufficient information" to satisfy the purposes of the statute.[27] Consequently, subsequent decisions in accord with *Reaves* and *Carr* provided that even though one or more of the seven required categories of information were not fully addressed, so long as substantial compliance, as defined in *Carr*, was had, the notice was sufficient.[28] However, the court was swift to point out that no compliance, and compliance that was not substantial, were insufficient.[29]

During the *Lumpkin / Carr* shift, I was employed with the Attorney General's Office and assigned to the Mississippi Tort Claims Board, where I coordinated the defense of all tort claims against state agencies and employees. Greg Hardy, the

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[23] 729 So. 2d 1237 (Miss. 2006).

[24] *Id.* at 1240.

[25] 733 So. 2d 261 (Miss. 1999).

[26] *Id.* at 265.

[27] *Id.* at 263. For a lengthy discussion of the purposes of notice of claim statutes, see J. James Fraiser III, *Persons or Entities Upon Whom Notice of Injury or Claim Against State of State Agencies May or Must be Served*, 45 ALR 5th 173, 190 (1996). These purposes ordinarily include giving the entity time to adequately investigate the claim and settle it without incurring legal expenses if it is meritorious, prepare a defense and locate witnesses and other evidence while still available, budgeting for fiscal liabilities, and correcting the problem before others are injured. *Id.*

[28] *See, e.g.*, City of Pascagoula v. Tomlinson, 741 So. 2d 224 (Miss. 1999), rev'd, Univ. of Miss Med. Ctr. v. Easterling, 928 So. 2d 815 (Miss. 2006).

[29] *See, e.g.*, Little v. Miss. Dep't of Human Servs., 835 So. 2d 9, 12-13 (Miss. 2002) ("we can hardly afford relief under the [MTCA] when there is no effort to comply with the procedural mandates."), and Gale v. Thomas, 759 So. 2d 1150, 1158 (Miss. 1999) (quoting *Carr* at 733 So. 2d at 265 ("[S]ubstantial compliance is not the same as, nor a substitute for, non-compliance."))

Administrator for the Mississippi Tort Claims Fund, and the Board's claims adjuster, Bruce Donaldson, notified me that the Board was concerned that the immunities and defenses afforded by the statute were being substantially eroded by the progeny of *Reaves* and *Carr*. At the Board's behest, I drafted a proposed amendment to Section 11-46-11(1), which the Legislature adopted in April of 1999. The amendment accorded plaintiffs suing the state the 95 day tolling period before suit need be filed, as had been allowed under the old statute, but increased the tolling period to 120 days for actions against political subdivisions. As before, this tolling period also served the legislative purpose of allowing governmental entities sufficient time to investigate and settle claims prior to litigation. To those tolling periods, the 1999 amendment added an additional 90 days during which the plaintiff could delay before filing a complaint.[30]

Finding that this additional time made the notice statute less difficult to comply with,[31] the Mississippi Supreme Court began enforcing stricter substantial compliance requirements by finding fault with incomplete compliance with the seven notice factors of subsection (2).[32] In *Fairley v. George County*,[33] the court ruled that a claim notice letter, which was not served by the statutorily required methods, and did not contain a statement of facts and did not state the extent of injuries and damages sought that were also required by the statute, did not constitute substantial compliance with the statute. The court

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[30] For a thorough discussion of how the 1999 amendment must be complied with, see Page v. University of Southern Mississippi, 878 So. 2d 1003 (Miss. 2004), which essentially held that, subsequent to the filing of notice, the limitations period of 11-46-11(2) is tolled for 95 or 120 days for the state or political subdivision, respectively, until the claim is denied in writing or the tolling period expires. MISS CODE ANN. § 11-46-11(2) (Supp. 1999). At that time, an additional 90 days is added during which the plaintiff must file the complaint. If the agency denies the claim before the tolling period expires, the plaintiff does not get credit for any unexpired tolling period time, and has only the unused remaining one year limitations period plus an additional 90 days in which to file suit.

[31] *See, e.g.*, Univ. of Miss. Med. Ctr. v. Easterling, 928 So. 2d 815 (Miss. 2006).

[32] Miss. Code Ann. § 11-46-11(2).

[33] 871 So. 2d 713, 718 (Miss. 2004).

subsequently decided, in *City of Pascagoula v. Tomlinson*,[34] that when a plaintiff deprived the governmental entity of its opportunity to investigate and settle claims by failing to wait the required 95 or 120 day tolling period between filing notice and filing suit (as provided in subsection (1) of the statute), the entity could petition the trial court for a stay of proceedings for the balance of the unexpired tolling (waiting) period.[35]

The court's gracious attempts to forgive failed efforts at substantial compliance, and its patience in dealing with plaintiffs and their attorneys who failed to substantially comply with red letter claim notice procedures, officially waned in 2004. That year, in the twin decisions of *Davis v. Hoss*[36] and Wright v. Quesnel,[37] the court declared that, when plaintiffs failed to comply with the statute's tolling provisions and filed suit before the 95 or 120 day tolling period lapsed, the public entity was not required to request a stay, but could move the court to dismiss the plaintiff's action for failure to comply with the statute's procedural requirements.

Any questions about whether this was a return to strict compliance with notice procedures was answered in the landmark decision of *University of Mississippi v. Easterling*.[38] In *Easterling*, the court declared that, "in order to make it perfectly clear to all that strict compliance is required, as stated in [*Davis*] and [*Wright*], we hereby overrule [*Tomlinson*] and its progeny."[39] In so doing, the court reversed the trial court's decision to deny the state's motion to dismiss for failure to comply with Section 11-46-11(2) by filing suit four months prior to filing notice of claim. It was not the duty of the state to file a motion for stay, the court concluded; the plaintiff had the option of voluntarily dismissing her prematurely filed complaint and properly serving notice, or suffering court-ordered dismiss-

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[34] 741 So. 2d 224 (Miss. 1999).
[35] *Id.* at 228.
[36] 869 So. 2d 397, 402 (Miss. 2004).
[37] 876 So. 2d 362, 367 (Miss. 2004).
[38] 928 So. 2d 815 (Miss. 2006).
[39] *Id.* at 819-20.

al for non-compliance.[40]

However, the *Easterling* Court made it crystal clear that its decision applying strict compliance only applied to the "mandatory" 90-day notice requirement contained in subsection (1) of Section 11-46-11,[41] and not to any other aspect of the statute. In other words, the rule of substantial compliance, as it related to the seven notice factors, was not abrogated by the *Easterling* decision as rendered on April 6, 2006.

That abrogation finally came on June 1, 2006,[42] in the decision of *South Central Regional Medical Center v. Guffy*.[43] In *Guffy,* the court decided that allowing claimants to not comply with any one of the seven notice factors contained in Section 11-46-11(2) rendered the concept of substantial compliance "meaningless."[44] Henceforth, the court declared, the issue would be whether the claimant complied, rather than substantially complied, with the statute.[45]

In light of the *Guffy* rationale, claimants must now provide the "substantial details" pertaining to each of the seven notice factors in order to comply with Section 11-46-11(2).[46] The failure of any claimant to "provide any of the seven [statutorily required] categories [of information]," for example, the failure to give a short and plain statement of the facts or to provide the plaintiff's residence address, "falls short of the statutory requirement and amounts to non-compliance."[47] And when some information is provided in each of the seven required categories, the courts "must determine whether the information is 'substantial' enough to be in compliance with the statute. If it is, the result is 'compliance' not 'substantial compliance' with

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[40] *Id.*

[41] *See Easterling*, 928 So. 2d at 820 (overruling *Tomlinson* and its progeny, "but only [as] to those cases' analysis of the ninety-day notice requirement" contained in 11-46-11(1)).

[42] This was also the date that the *Easterling* plaintiff's petition for rehearing was denied.

[43] 930 So. 2d 1252 (Miss. 2006).

[44] *Id.* at 1258.

[45] *Id.*

[46] *Id.*

[47] *Id.*

the requirements under [Section] 11-46-11(2)).”[48]

The *Guffy* compliance guidelines should be most welcome to practitioners dealing with the notice requirements of Section 11-46-11(1)-(2). However, before declaring that I predicted that a return to strict compliance was inevitable in my 1999 Mississippi Law Journal article,[49] or that I asked that comprehensible *Guffy*-like guidelines be provided in that same article,[50] I must admit that my proposed 1999 amendment to Section 11-46-11(1) proved rather difficult to understand, and was only clarified by the court's extraordinarily helpful explanation in its *Page* decision, which, according to the *Easterling* Court, is still good law.[51]

With adequate claim notice guidelines finally in place for the first time since 1999 (when the *Reaves* Court overruled *Lumpkin* and instituted a nebulous substantial compliance standard, and since my proposed amendment to subsection (1) of Section 11-46-11 muddied the waters further), Mississippi's bench and bar should be able to successfully navigate the requirements of both sections of 11-46-11. Just as importantly, the law has circled around to the point where justice may best be obtained: where governmental entities are accorded their legislatively-mandated information and a sufficient waiting period to investigate and settle claims prior to litigation, and plaintiffs are not denied their day in court by unnecessarily draconian (and incomprehensible) procedural requirements.

IV. Mississippi's Exemptions from Immunity and "Fraiser's Octopus"

My 1999 law review article[52] examined the nature of

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[48] *Id.* The Court found that the plaintiff's failure to send written notice that addressed the statutory requirements pertaining to the seven information factors, warranted dismissal of her action, and reversed the trial court's failure to grant the hospital's motion to dismiss.

[49] Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*, *supra* note 11.

[50] *Id.* at 713.

[51] 928 So. 2d at 820.

[52] Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*,

Mississippi's Tort Claims Act exemptions to immunity,[53] which, by legislative prerogative and choice, exempt Mississippi's governmental entities from liability for damages despite otherwise actionable conduct involving negligent acts and omissions. These exemptions were, I argued, disjunctive in nature, and thus, "like an octopus's arms; even if one does not get you, another one may."[54]

In other words, if a claimant sues an entity for injuries allegedly caused by the steepness of a roadway curve, the question arises whether the Act's exemptions bar her claim(s) against the entity designing the curve. If the claimant alleges improper design, the government may raise the design exemption[55] and argue that the claim is barred because the roadway had been designed in accordance with the design standards of the day. Even if the claimant were to successfully argue that the decision to design the roadway was not one within the officials' discretion, and that the discretionary exemption[56] did not bar the claim, she could not prevail on that argument, because one exemption, the design exemption, applied to her design claim, and that claim was thus snared by the exemption octopus's design arm and consigned forever to the watery grave of summary judgment.

However, I continued, should the claimant allege in her complaint the creation of a dangerous condition by allowing a pothole to develop in the curve as a *second and separate allegation*, then the octopus's design arm would have no effect upon *that* claim, and the entity must defend the dangerous condition claim by resort to another of the octopus's arms, the dangerous condition exemption,[57] and demonstrate that it had no pre-accident knowledge of the condition or that the condition was open and obvious to the driver/claimant. If the plaintiff failed

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supra note 11.

[53] *See* MISS. CODE ANN. § 11-46-9 (1)(a-x) (2000).

[54] Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*, *supra* note 11, at 743.

[55] MISS. CODE ANN. § 11-46-9(1) (2000).

[56] MISS. CODE ANN. § 11-46-9(1)(d) (2000).

[57] MISS. CODE ANN. § 11-46-9(1)(v) (2000).

to meet her burden of proof as to governmental knowledge, then the octopus's dangerous condition arm would drag her claim beneath the waves and beyond all hope of monetary recovery.

Mississippi's appellate courts struggled with these issues for years before finally deciding to adopt my octopus-metaphor rationale. In *Pearl River Valley Water Supply District v. Bridges,*[58] the Mississippi Court of Appeals held that, even though the discretionary exemption may not have barred the claimant's excessive force claim, the police protection exemption did. This was so, the court reasoned (while citing my law journal article),[59] because the exemptions were "written in the disjunctive" as indicated by the Act's use of the word "or," so the "[a]pplicability of any one of these [exemptions] creates immunity."[60] This landmark decision had the effect of settling the issue of the applicability of the octopus's arms to any one claim. The *Bridges* claimant had only raised one claim—excessive force, and the police protection exemption barred it, so there was no need to consider whether or not the discretionary exemption applied to the facts of the case.[61] This rationale was most recently reiterated by our court of appeals in *Willing v. Benz*, wherein the court stated:

> As established by precedent of both this Court and our supreme court, where any of the immunities enumerated in section 11-49-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of.[62]

The second issue, as to the efficacy of one octopus's arm in

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[58] 878 So. 2d 1013 (Miss. Ct. App. 2004).

[59] *Id.* at 1016.

[60] *Id.*

[61] The Mississippi Supreme Court has yet to hear the case on appeal, so that decision has yet to be written in stone.

[62] 2005-CA-00470-COA, 2006 WL 3361190, *11 (Miss. Ct. App. Nov. 21, 2006) (declaring that, since the police protection exemption barred the plaintiff's wrongful death claim, there was no reason to address whether or not the trial court's determination of immunity vis-à-vis the discretionary exemption was proper).

defeating two or more claims, was decided by the Court of Appeals in *MacDonald ex rel. v. Mississisippi Deptartment of Transportation*[63] In *MacDonald*, the plaintiff, injured while traversing the pre-Katrina bridge between Ocean Springs and Biloxi, raised several claims, including defective design, negligent construction, negligent maintenance, and failure to warn of a dangerous condition. The lower court granted summary judgment on the defective design claim, but not on the other claims. The issue before the appellate court, as concisely stated in the Trial Lawyers' amicus brief, was whether "Fraiser's octopus", by defeating one claim (defective design), defeated them all, as it had defeated the one claim in *Bridges*.

Once again, citing my law journal article in support of its rationale, the court ruled that the one exemption did not defeat all other claims, and that for each claim raised by a plaintiff, any one exemption (octopus's arm) may ensnare and defeat it, but whether it defeats any other claims, or whether any other exemptions apply to those other claims, must be determined on a case-by-case basis.[64] Stating that, "[w]e read Mr. Fraiser's law review article to comply with our current decision,"[65] the Court cited my example, taken from the New Jersey case of *Costa v. Josey*,[66] where that court had determined that the barring of a design claim by the New Jersey Tort Claims Act's design exemption would afford the government no immunization on the plaintiff's negligent maintenance claim. The Mississippi Court of Appeals (correctly) concluded that my law review article did not advocate the interpretation of the all-destroying "Fraiser's octopus" as erroneously found by the lower court, and that "succinctly put, immunity as to one claim does not necessarily, as a matter of law, equate to" immunity as to all claims.[67]

While the Mississippi Court of Appeal's approach to these

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[63] 2005-CA-00128-COA, 2006 WL 2671952 (Miss. Ct. App. Sept. 19, 2006).
[64] *Id.* at *5.
[65] *Id.* at *6.
[66] 415 A.2d 337 (N.J. 1980).
[67] *MacDonald*, 2006 WL 2671952, at *6.

issues is both middle-ground just and consistent with legislative intent, it does create a potential danger that must be briefly addressed here. Although one exemption does not necessarily apply to any other claims, it may sometimes apply. This is particularly so where the plaintiff has resorted to what I characterized in the aforementioned law review article as "artful pleading."[68]

In this context, "artful pleading" occurs when a plaintiff realizes that his claim, let us say, a design claim, is barred by the design exemption, so he re-casts that claim as separate failure to warn and negligent maintenance claims. The courts should not allow such tactics to resurrect an otherwise dead-in-the-water-by-exemption-octopus-arm claim.

Some courts in other states have already refused to do so. In *Manna v. State*,[69] it was held that "a plaintiff cannot cast a design improvement as a 'maintenance' action to circumvent immunity given the 'original design.'"[70] Where roadway design was the real issue, the court concluded, and the design had been properly approved in accordance with the design standards of the day, no dangerous condition claim could prevail simply because of "the advent of faster automobiles."[71]

Similarly, in *Szymanski v. Department of Highways of the State of Colorado*,[72] it was decided that the plaintiff's attempt to characterize a design claim as improper sightline, absence of warning signs or negligent maintenance claims, could not avert dismissal of all claims, since all of them related to the claimed inadequacies of the roadway's design.[73]

In other words, truly separate claims must be defeated by separate exemptions, as would be the case with the claims of

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[68] *See* Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*, *supra* note 11, at 749-51.

[69] 609 A.2d 757 (N.J. 1992).

[70] *Id.* at 766.

[71] *Id.* at 763.

[72] 776 P.2d 1124 (Colo. Ct. App. 1989).

[73] *Id.* at 1125. *See also* Swieckowki v. City of Fort Collins, 923 P.2d 208 (Colo. Ct. App. 1995) (holding dangerous condition allegation defeated by design exemption where the condition was caused by the design, not the subsequent maintenance, of a roadway).

negligent design and subsequent improper maintenance by failing to replace a stop sign. However, where the other claims are all mere rewording of the original barred claim, a different result is obtained. For example, where the roadway was properly designed so as to bar a design claim, but the claimant alleges different flaws such as improper sightline and absence of particular warning signs, which are nothing more than complaints about the original design, such artful pleading should not be allowed to delay dismissal and cause needless further litigation expense.

V. DISCRETIONARY EXEMPTION

Mississippi Code Section 11-46-9(1)(d) immunizes governmental entities for all acts or omissions based upon the exercise or performance or failure to exercise or perform a discretionary function or duty of a governmental entity or employee, whether or not that discretion is abused. The first issue relevant to any discretionary exemption, federal or state, is the standard applicable to the exemption. Mississippi's appellate courts have taken a decidedly schizophrenic approach to this issue.

They first ruled that "discretion" was simply a matter of whether a governmental employee exercised judgment in a matter where the action was not otherwise mandated by law, regulation or ordinance.[74] In other words, if an act was required by law, its carrying out was a ministerial act, and not a discretionary one. But where the law was silent as to how an act should be performed or decision should be made (or not), so long as the employee acted or failed to act within his or her discretion and judgment, the act or omission was immunized by this exemption.

Subsequently finding this interpretation too conservative, Mississippi's appellate courts allowed bad facts to create bad law by borrowing an "ordinary care" requirement from another

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[74] *See, e.g.*, T.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995) (discussing a pre-MTCA issue focusing upon the ministerial vs. judgment issue that carried over into post-MTCA considerations).

exemption (exemption (b), commonly known as "the compliance with statutes and ordinances exemption"), and adding it to the discretionary mix.[75] Now, in addition to exercising judgment, a governmental employee was also required to exercise ordinary care for the exemption to immunize his or her negligent acts or omissions.[76] This was an absurd[77] approach,[78] since the legislature's obvious intent in creating this exemption was to immunize discretionary acts regardless of negligence (the lack of ordinary care) or whether the discretion was abused.

Realizing they had overstepped legislative intent and the bounds of reason, our courts once again wisely circled back to the middle, deleted the "ordinary care" requirement, and added a "policy considerations" prong to the discretionary analysis.[79] This meant that, since ordinary care was no longer a relevant issue, the discretionary exemption applied when (a) an employee exercised discretion (judgment) where that judgment was not foreclosed by legal mandate and was thus not ministerial,[80] and (b) the act also involved potential considerations of

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[75] *See, e.g.*, L.W. v. McComb Sep. Mun. Sch. Dist., 754 So. 2d 1136, 1142 (Miss. 1999) (announcing this mistake for the first time); and Miss. Dep't of Transp. v. Cargile, 847 So. 2d 258, 266-69 (Miss. 2003) (noting the court's final adherence to its mistake).

[76] See *Harris v. McRay*, 867 So. 2d 188 (Miss. 2004) for an excellent explanation of how the Court made this mistake, and how it chose to correct it, holding that a high school coach's decision as to whether to rest or continue to practice a player who subsequently died during practice was discretionary, because it involved judgment and the policy of letting the coach be the coach, notwithstanding that the decision may not have passed the now-inapplicable ordinary care test.

[77] This judicially-created legal fiction ranks with other legal fictions such as (a) testimony that the breathalyzer is incapable of error, (b) the voir dire assertion that all anyone (including the lawyers and parties) wants is a fair jury; and (c) the oft-made judicial assertion in the early part of the last century that a jury was presumed to have followed the court's instruction to presume, at the beginning of a criminal trial, the innocence of the defendant, clad as he was in jailhouse attire, handcuffs and leg-irons.

[78] As eloquently noted in Robert F. Walker, Comment, *Mississippi Tort Claims Act: Is Discretionary Immunity Useless?*, 71 MISS. L.J. 695, 696 (2001).

[79] See the marvelously reasoned decision of *Dozier v. Hinds County*, 354 F. Supp. 2d 707, 713-15 (S.D. Miss. 2005), for an insightful discussion of the metamorphosis of the Mississippi Tort Claims Act's discretionary exemption as interpreted by Mississippi's appellate courts.

[80] See *Willing v. Benz*, No. 2005-CA-00470-COA, 2006 WL3361190, at *9

social, economic or political policy alternatives.

This second prong of the discretionary test, that of policy considerations, expands "discretion" to mean more than merely exercising judgment. "Judgment/discretion" must also implicate social, economic or political policy to be immunized judgment/discretion. In other words, the decision by a bus driver to allow a claimant to exit a school bus at a particular intersection does not implicate policy, and is merely a judgment call, and thus not immunized by this exemption.[81] However, a school board's decision to allow children to de-board buses during thunderstorms, at busy intersections, during nuclear attacks, etc., is a policy decision which may not be second guessed, even where ordinary care is not utilized by the board. Thus, if the board has decided that children may be let off at all intersections, then the driver's decision to do so is immunized as discretionary—i.e., as involving judgment-plus-policy considerations.

Despite the fact that this concept sounds very middle-ground just and quite reasonable, it has not served as a firm guide for our appellate courts. Although ordinary care was banned from the exemption in 2004 in *Collins v. Tallahatchie County*,[82] and policy considerations were written in to the test in 2003 in the case of *Doe v. State, ex rel. The Mississippi Deptartment of Corrections*,[83] our courts have not always followed this precedent.

In *Sanders v. Riverboat Corp. of Mississippi-Vicksburg*,[84] the Mississippi Court of Appeals applied the discretionary/judgment/ministerial standard to treatment rendered by a paramedic without mentioning the policy aspect and while

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(Miss. Ct. App. Nov. 21, 2006), for an excellent definition of the first prong of this exemption-the ministerial/discretionary analysis: "If the duty at issue is imposed by law and the time, manner, and conditions for carrying out that duty are specified, leaving no room for discretion," that "duty does not involve an element of choice or judgment, i.e., is ministerial and not discretionary."

[81] *See* Stewart v. City of Jackson, 804 So. 2d 1041, 1048 (Miss. 2002).

[82] 876 So. 2d 284, 289 (Miss. 2004) (reversing cases imposing ordinary care requirement).

[83] 859 So. 2d 350, 356-57 (Miss. 2003).

[84] 913 So. 2d 351, 355-57 (Miss. Ct. App. 2005).

applying the defunct ordinary care standard. Further, in *Doe*, although the Mississippi Supreme Court noted that the policy prong applied to the discretionary test, it did not specifically apply it, holding forth with a largely judgment/ministerial analysis.[85]

There are, however, a few cases that provide guidance to the practitioner navigating the treacherous waters of discretionary exemption law. In *Stewart v. City of Jackson*,[86] it was held that a city bus driver's decision to allow an elderly passenger to exit the bus and cross a street by herself, a non-ministerial act involving judgment, did not involve real policy decisions, so the discretionary exemption did not immunize it.[87]

Noting that the purpose of the two-prong public policy function discretionary exemption test was to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort,"[88] the court, in *Dotts v. Pat Harrison Waterway District*,[89] ruled that the district's decisions as to sufficient enclosure of the water area, signage at the pond, and its decisions regarding lifeguards and their equipment, were grounded in public policy and susceptible to a policy analysis, and thus protected by the discretionary exemption.[90]

A recent federal decision interpreted the policy prong of the MTCA's discretionary exemption to hold that a regional housing authority official's decision to issue housing-choice vouchers to tenants allowing them to obtain housing elsewhere constitut-

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[85] *Doe,* 859 So. 2d at 356-57; *See also* Ladner v. Stone County, 938 So. 2d 270, 275-77 (Miss. Ct. App. 2006) (the court notes the policy aspect of the exemption but focuses only upon the judgment/ministerial aspect); and Johnson v. Alcorn State Univ., 929 So. 2d 398 (Miss. Ct. App. 2006) (holding a dormitory director's decision on how to deal with dangers to students presented by outsiders is within his discretion and thus immunized, but not addressing the policy issue).

[86] 804 So. 2d 1041 (Miss. 2002).

[87] *Id.* at 1048.

[88] Dotts v. Pat Harrison Dist., 933 So. 2d 322, 327 (Miss. Ct. App. 2006) (quoting Berkowitz v. U.S., 486 U.S. 531, 536-37 (1988)).

[89] *Id.*

[90] *Id.* at 327-38.

ed an immunized policy discretion decision, in *Urban Developers L.L.C. v. City of Jackson*.[91] That court further noted that "a wide variety of governmental conduct has been held [by Mississippi's appellate courts] to involve the implementation of social, economic or political policy."[92] The examples cited by the court included:

> [T]he manner in which a police department supervises, disciplines and regulates its police officer, *City of Jackson v. Powell*, 917 So. 2d 59, 74 (Miss. 2005); the decision to grant or deny parole, *Doe v. State ex rel. Mississippi Dep't of Corr.*, 859 So. 2d 350 (Miss. 2003) the placement or non-placement of traffic control devices or signs, *Barrentine v. Miss. Dep't of Transp.*, 913 So. 2d 391 (Miss. App. 2005); the acts or omissions of high school football coach which caused a player to suffer heatstroke during practice, *Harris ex rel. Harris v. McCray*, 867 So. 2d 188 (Miss. 2003); and the decision of emergency medical personnel to use a "load and go" approach on an expectant mother. *Sanders v. Riverboat Corp. of Mississippi-Vicksburg*, 913 So. 2d 351 (Miss.App. 2005).[93]

And in another recent decision, the Mississippi Court of Appeals declined to determine whether a police officer's act of radioing in the location of a dangerous condition on a roadway, rather than remaining on the scene and warning approaching drivers of the condition, was immunized by the discretionary immunity, because, although the lower court found that the act was not ministerial, the lower court did not then proceed with the required additional analysis of whether the decision implicated policy.[94] Suffice it to say, the two-prong ministerial/policy discretionary test is the law of the land in Mississippi.[95]

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[91] 468 F.3d 281, 306 (5th Cir. 2006).

[92] *Id.*

[93] *Id.*

[94] *See* Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *10 (Miss. Ct. App. Nov. 21, 2006). Remand was held unnecessary, however, since another exemption was found to have barred the plaintiff's claim. *Id.* at *10.

[95] Legal scholars have long argued that this public function policy test should be applied to all state and federal discretionary exemptions since the United

To summarize, the first issue to be broached with regard to the discretionary exemption is whether or not law, ordinance or regulation requires that an act be performed a certain way, thereby making it ministerial rather than discretionary. If there is no such mandate, and the act, decision or omission requires discretion or judgment, then for immunity to apply, the act, decision or omission must also have been subject to policy analysis. This means that the act or decision or omission happened, or did not happen because it was the kind of thing about which a governmental entity decision-making body could have met, and discussed its social, economic or political ramifications and decided to have done or not done something in a particular way.

Although this sounds like vintage Groucho Marx at best, and something imagined by Franz Kafka at worst, it is really not as difficult as it sounds, notwithstanding the fact that our courts have encountered almost as much difficulty with it as the Marx Brothers encountered in *Duck Soup*.

But I digress. The *Stewart* and *Dotts* cases have provided sufficient guidance on the second prong of the discretionary test so that everyone can tell the difference between a decision to let a lady off a bus or the decision to place particular signs at a pond and to provide lifeguards with particular life-saving equipment.[96] The former decision is judgment only, while the second involves a judgment-plus-policy analysis. The plethora of judgment/ministerial cases handed down by our courts show the necessity of determining whether any law mandates action or inaction when calculating the first prong of the discretionary exemption test.[97] However, whether or not counsel should en-

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States Supreme Court's decision of *United States v. Gaubert*, 499 U.S. 315, 322 (1991), but some states still utilize other tests which do not include a policy analysis. *See infra* note 98 and accompanying text.

[96] *See* Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*, *supra* note 11, at 777-79 (1999) (detailing the analysis of this two pronged policy oriented test, and differing tests utilized in other jurisdictions).

[97] See, for example, *Mississippi Department of Mental Health v. Hall*, 936 So. 2d 917, 925 (Miss. 2006), where a patient fell from a third story window while attempting to escape a state mental facility, the court declared that § 41-21-102(6) required all such facilities to keep their inmates safe, and the failing to

gage in all this reckoning before filing a lawsuit or defending one under Mississippi's Tort Claims Act is entirely up to his or her discretion. But good judgment and sound policy militate in favor of taking the time.

VI. Police Protection

Mississippi Code Section 11-46-9(1)(c) provides immunity for a governmental employee engaged in activities or duties related to police or fire protection[98] unless the employee acted in reckless disregard for the safety and well-being of any person not engaged in criminal activity at the time of injury. Consequently, the three issues involved in an analysis of liability pursuant to this section are (a) what constitutes activities or duties related to police protection; (b) what constitutes reckless disregard; and (c) what constitutes "criminal activity" within this context.

A. What is "Police Protection"?

Our appellate court has found police protection to include a host of activities "clearly integral to providing police protection."[99] These have included "deciding whether to arrest a driver or allow him to continue driving, arresting and detaining a suspect, administering an intoxilizer test on the roadway, accidentally shooting a person resisting arrest, aiming weapons at and negligently detaining a suspect,"[100] patrolling the streets and negligent maintenance of a police vehicle's brakes,[101] using a county sheriff's vehicle to drive to a location

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check potentially unlocked doors or installing security screens on windows were ministerial acts. The Court consulted Black's Law Dictionary in defining "ministerial" as "function[s] as to which there is no occasion to use judgment or discretion." *Id.*

[98] Fire protection has not been the source of extensive litigation as has police protection and is consequently not covered here. *See* Fraiser *supra* note 13, at 766-767 (1999).

[99] McGrath v. City of Gautier, 794 So. 2d 983, 985 (Miss. 2001) (citing Fraiser, *Substantive Provisions of the Mississippi Government Immunity Act*, *supra* note 11, at 758-71).

[100] *Id.*

[101] *Id.*

in order to obtain keys for county gas pumps,[102] combat drills as part of a federally funded police corps training program,[103] a sheriff's seizure of goods on behalf of a creditor,[104] a police officer's decision to pursue a suspect in a high-speed chase,[105] a police officer's radioing-in the location of a dangerous condition on a roadway,[106] an officer's subduing of a citizen resisting arrest,[107] and the activities of a 911 police emergency operator.[108]

Suffice it to say, this prong of the reckless disregard test is not difficult to meet, and, ironically, is often met by the plaintiff's act of pleading that the defendant acted in the course and scope of his duty as a police officer. As for the other two prongs, to quote the Bard, "ay, there's the rub."[109]

B. What is "Reckless Disregard"?

Reckless disregard was defined as willful and wanton conduct which requires knowingly and willingly and intentionally performing a wrongful act, in the Fifth Circuit decision of *In Re Foust*.[110] However, it has also been defined by Mississippi's highest court as more than negligence, but less than an intentional act, accompanied by a conscious indifference to consequences amounting almost to a willingness that harm should follow—a higher standard than gross negligence but not intentional per se—in *Mississisippi Department of Public Safety v.*

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[102] Reynolds v. County of Wilkinson., 936 So. 2d 395, 397 (Miss. Ct. App. 2006).

[103] Hayes v. Univ. of S. Miss., No. 2004-CA-02277-COA, 2006 WL 2406224, at *4 (Miss. Ct. App. Aug. 22, 2006).

[104] In re Foust, 310 F.3d 849, 864-65 (5th Cir. 2002).

[105] Broome v. City of Columbia, No. 2005-CA-0000605-COA, 2006 WL 2947886, at *4 (Miss. Ct. App. Oct 17, 2006).

[106] *See* Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *8 (Miss. Ct. App. Nov. 21, 2006).

[107] Stone v. Damons, No.1:05CV102, slip op. at 7 (N.D. Miss. Nov. 2, 2006).

[108] Lee County v. Davis, 838 So. 2d 243, 245 (Miss. 2003).

[109] WILLIAM SHAKESPEARE, HAMLET, act 3, sc 1.

[110] 310 F.3d 849 (5th Cir. 2002) (stating federal court precedent is persuasive but not binding on Mississippi courts, but is certainly acceptable "grist for the mill").

Durn.[111] A more recent definition may be found in *Jackson v. Payne*,[112] where the Court of Appeals cited the Mississippi Supreme Court's resort to Black's Law Dictionary to produce the following definition originally related in *Turner v. City of Ruleville*:[113] "the voluntary doing . . . of an improper or wrongful act, or with knowledge of existing conditions, the voluntary refraining from doing a proper or prudent act when such an act or failure to act evince[s] an entire abandonment of any care, and heedless indifference to results which may follow and the reckless taking of a chance of an accident happening without intent that any occur."[114]

In the final analysis, it appears that indifference in the face of a good chance of accidental personal injury[115] is at the heart of "reckless disregard." The Mississippi Supreme Court has worded it more eloquently, declaring that it will find reckless disregard when the "conduct involved evince(s) not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved."[116]

In other words, if an officer subdues a physically disputatious arrestee, he will not be found to have acted with reckless disregard even if he accidentally injures the arrestee short of using wanton force.[117] However, where an officer shoves a

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[111] 861 So. 2d 990 (Miss. 2003).

[112] 922 So. 2d 48 (Miss. Ct. App. 2006).

[113] 735 So. 2d 226 (Miss. 1999).

[114] *Id.* at 229. A recent Mississippi Court of Appeals case focused upon whether an officer's act evinced a refusal to exercise "any care" or that his actions "evinced 'almost a willingness that harm should follow,'" in *Willing v. Benz*, No. 2005-CA-00470-COA, 2006 WL3361190, at *10 (Miss. Ct. App. Nov. 21, 2006). (noting that an officer's decision to radio-in information on a dangerous condition on a roadway rather than remaining on the scene and warning oncoming traffic of the danger, while possibly not even negligent, was certainly not an indication of a refusal to exercise "any care").

[115] I say personal injury, because injury to property cannot be the source of liability under this statute. *See* Lee County v. Davis, 838 So. 2d 243, 245-46 (Miss. 2003) (holding reckless disregard actionable only where personal injury is involved, not damage to property).

[116] Maldonado v. Kelly, 768 So. 2d 906, 911 (Miss. 2000).

[117] *See* Brown v. City of McComb, 84 F. App'x 404 (5th Cir. 2003).

handcuffed arrestee's face into a concrete floor,[118] or beats and kicks a subdued and handcuffed arrestee,[119] he will be found to have acted with reckless disregard.

It appears that the history of Confederate General Nathan Bedford Forrest may be instructive on this point. Commendable, it is, to take the fight to the enemy with great dispatch so long as he continues to fight back, as was the case at Forrest's resounding victory at the battle of Brice's Crossroads, Mississippi; but after the enemy has surrendered, as had black federal troops at Fort Pillow, Tennessee, there is no excuse for continuing to make war upon him.

Regarding "honest" mistakes, a law enforcement officer will be immunized under this statute if she arrests the wrong person, so long as the arrest is with probable cause or pursuant to a warrant,[120] or if he draws his weapon during a misdemeanor arrest where he has reason to believe that shots have been fired in the area.[121] Conversely, when an officer makes an arrest with no probable cause and without comparing the photo on a driver's license to the appearance of the person driving the car,[122] he will be found to have acted with reckless disregard.[123]

Another situation where the issue of reckless disregard is often litigated is that involving motor vehicle accidents caused by law enforcement officers. Whether reckless disregard is found in those cases depends upon a specific set of circumstances attending the accidents in question, and the efforts made by the officer to avoid injury to others.

In *Ogburn v. City of Wiggins*,[124] an officer who struck a

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[118] As occurred in *City of Jackson v. Calcote*, 910 So. 2d 1103 (Miss. Ct. App. 2005).

[119] *See* City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2005).

[120] *See* Blackmon v. Carroll County Sheriff's Office, No. Civ.A. 3:05CV91LN, 2006 WL 286783 (S.D. Miss. Feb. 3, 2006) (arresting a woman based upon her statement that she is guilty, where no reason exists to disbelieve her, was held not to be reckless disregard).

[121] *See* Smith v. Brookhaven, 914 So. 2d 180 (Miss. Ct. App. 2005).

[122] *See* Craddock v. Hicks, 314 F. Supp. 2d 648 (N.D. Miss. 2003).

[123] *Id.* at 655.

[124] 919 So. 2d 85 (Miss. Ct. App. 2005).

vehicle which was traveling in the wrong lane was held not to have acted with reckless disregard since the weather was clear, he was driving a short distance in a rural area, and he testified that he was looking out for other drivers when this one veered suddenly into his lane. Similarly, in *Joseph v. City of Moss Point*,[125] although the officer was stopped and not paying attention to traffic in his own lane, and moved forward as a reflex response to an accident occurring ahead of him, the fact that he attempted to slam on his brakes and avoid hitting the vehicle in front of his was held to demonstrate that he did not act in reckless disregard. Further, in *Bonner v. McCormick*,[126] where a driver idling at an intersection began driving when the light turned green, but then suddenly stopped, it was held that the officer who hit him from behind had not acted with reckless disregard where the officer had insufficient time to stop despite attempting to do so.

However, in an effort to curb dangerous conduct by a decided minority of law enforcement officers, the courts have found reckless disregard in circumstances where an officer drives blindly into an accident without concern for the consequences to others. In *City of Jackson v. Brister*,[127] the Mississippi Supreme Court for the first time considered five high-speed pursuit factors in determining whether an officer was acting with reckless disregard while in pursuit of another. These factors are (1) the length of the chase, (2) the type of neighborhood, (3) the characteristics of the streets, (4) the presence of other traffic, (5) weather conditions and visibility, and (6) the seriousness of the pursuit.[128] Following this rationale, our Supreme Court

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[125] 856 So. 2d 548 (Miss. Ct. App. 2003).

[126] 827 So. 2d 39 (Miss. Ct. App. 2002).

[127] 838 So. 2d 274, 280 (Miss. 2003).

[128] *Id.* at 280. A more recent case citing these factors is *Broome v. City of Columbia*, No. 2005-CA-00605-COA, 2006 WL 2947886, *3 (Miss. Ct. App.), in which the court found that an officer's decision to pursue a driver suspected of having committed a mere misdemeanor, who later collided with the plaintiff, was held not to be reckless disregard because the officer was familiar with the route taken during pursuit, the characteristics of the neighborhood allowed a chase, the visibility of the suspects was good at all times, the length of the chase was not excessive, and most importantly, the officer suspected that the driver was intoxi-

found reckless disregard where an officer sped through a busy city intersection, without siren blaring, where visibility was limited, and failed to yield the right of way, in *City of Jackson v. Lipsey*.[129] Likewise, in *Mississippi Department. of Public Safety v. Durn*,[130] where a speeding trooper passed a vehicle on the left which was in the process of making a left turn, and struck that vehicle, he was found to have acted with reckless disregard, since he knew the driver was turning but sped on in the face of potential harm to others.[131]

The difference between reckless disregard and immunized negligence may be explained with resort to another historic incident. Union Admiral David Farragut's words when braving the batteries at Mobile en route to Vicksburg—"damn the torpedoes, full speed ahead," worked well in wartime, but would not suffice on Mississippi's public roads, nor should it. It is one thing to preserve the Union with a courageous-to-the-point-of-recklessness naval assault, and yet another to maim innocent civilians because you did not take the time to look before you leapt.

C. What is "Criminal Activity"?

Once a plaintiff has established that a law enforcement officer acted with reckless disregard, she has one more hurdle to clear before she has overcome the police protection exemption. She must establish that she was not engaged in criminal activity at the time she was injured by the officer's recklessness. The matter to determine, then, is what is meant by "criminal activity"?

In *City of Jackson v. Perry*,[132] it was held that, whether

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cated, and had a legitimate basis, apart from the outstanding misdemeanor warrant, to pursue him.

[129] 834 So. 2d 687 (Miss. 2003); *see also* Jackson v. Brister, 838 So. 2d 274 (Miss. 2003).

[130] 861 So. 2d 990 (Miss. 2003).

[131] *Id.* at 997 ("[W]e cannot equate making a left turn operating a vehicle with a .20 blood alcohol content level. Durn's left turn was not the criminal activity that caused [the officer] to give chase.")

[132] 764 So. 2d 373 (Miss. 2000).

the criminal activity is a traffic offense, any other misdemeanor, or a felony is irrelevant; so long as the officer has probable cause to arrest and proceeds to do so, the act leading to the probable cause meets Mississippi's definition of "criminal activity."[133] However, the court continued, to be the species of criminal activity contemplated by the statute, it must be "more than fortuitous . . . it must be shown that the [injured party] was engaged in criminal activity that is a cause of the harm."[134]

In other words, where the criminal activity results in the officer making an arrest, the requisite nexus exists to defeat liability. The penultimate case making this point was *Pearl River Valley Water Supply District v. Bridges*,[135] where the plaintiff's act of resisting arrest was the activity that caused the officer to use force to make an arrest. The court found a sufficient nexus between the criminal activity and the alleged harm to grant immunity under the statute.[136]

Conversely, in *Durn*,[137] no causal nexus was found where, although the plaintiff was executing an illegal left turn when he was struck by the trooper's vehicle, his illegal turn was merely fortuitous criminal activity, and not the cause of the harm, which was the trooper's negligent speeding in the wrong lane.[138] Similarly, in *City of Jackson v. Calcote*,[139] the Mis-

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[133] *Id.* at 379.

[134] *Id.*

[135] 878 So. 2d 1013 (Miss. Ct. App. 2004).

[136] *See also,* Pasco v. Holly Springs, 101 F. App'x 6, 8 (5th Cir. 2004) (holding that a sufficient nexus existed by virtue of the plaintiff's driving under the influence and fleeing arrest, even though the officer who struck the plaintiff intentionally bumped him off the road with his cruiser during a high speed chase. The officer's act certainly constituted reckless disregard, but the plaintiff was engaged in criminal activity, so the officer's act was immunized by the police protection exemption); and Stone v. Damons, No. 1:05CV102, 2006 WL 3147725, at *6 (N.D. Miss.) (finding the plaintiff's act of resisting of arrest, itself a misdemeanor, was the reason that the officer used reasonable force to subdue her, and thus constituted "criminal activity" with supporting nexus sufficient to immunize the officer under this exemption).

[137] Miss. Dept. of Safety v. Durn, 861 So. 2d 990 (Miss. 2003).

[138] *Id.* at 997-98.

[139] 910 So. 2d 1103 (Miss. Ct. App. 2005).

sissippi Court of Appeals ruled that even though the claimant was arrested on an outstanding warrant, had drugs in his car, and attempted to escape and resisted handcuffing, since the beating he received occurred after he was subdued, handcuffed, and no longer committing any crime, there existed no nexus between the claimant's criminal activity and the officer's reckless assault of his person, so the city could find no respite in the exemption.[140]

Clearly, for the criminal activity to be the type that excuses an officer's reckless disregard, it must be the cause of the injury and not merely fortuitous, and it must be ongoing criminal activity at the precise time of the injury.

VII. Dangerous Condition Exemption

Section 11-46-9(1)(v) of the Mississippi Code immunizes governmental entities for injuries arising from a dangerous condition on governmental property that was not caused by the entity's negligent or wrongful conduct, or of which it had no notice, either actual or constructive, and no adequate opportunity to protect or warn against the condition, provided that the entity had no duty to warn of any condition open and obvious to anyone exercising due care.

In other words, to recover in the face of this exemption's immunizing provisions, a claimant must prove (1) that a dangerous condition existed on government property,
(2) that it was caused by the entity and/or the entity had notice of the condition and adequate time to protect or warn against it, and (3) that the condition was not open and obvious to the claimant with the exercise of due care.

A. What is a "Dangerous Condition" on Government Property?

Although a dangerous condition is ordinarily easy to recognize (i.e., we know it when we see it, or fall into it, as the case may be), and the concept of "on government property" largely speaks for itself, this issue, much like a hidden danger, is more

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[140] *Id.* at 1108-11.

troublesome than it appears at first blush.

It was held in *Jenkins v. MDOT*[141] that proof of a dangerous condition in the public streets or highways, no matter how dangerous it may be, is never sufficient proof for recovery; there must also be proof that a standard was violated with regard to the condition or that an engineer failed to follow the appropriate inspection procedure.[142]

In other words, that a condition exists on government property means little with regard to liability. The claimant must also offer a reasonable explanation as to how it got there. This is so because if a dangerous condition on a roadway was caused solely by the weather, the government is immune, as per Section 11-46-9(1)(q).

Furthermore, to be actionable, the dangerous condition must have been created by the character of the governmental property, not by non-governmental human agency. As was held in *Johnson v. Alcorn State University*,[143] a dangerous condition on a college campus cannot be a danger that hoodlums may shoot someone; it must be dangerous due to its physical character.[144] That is to say, due to an unreasonably darkened parking lot or a field bordered by an electric fence with no signs warning against the danger of electrocution.[145]

B. Causation

Proof of causation does not guarantee a finding of liability as it may in other legal contexts; it is merely a necessary step in the progression towards proof of liability. It will not be in-

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[141] 904 So. 2d 1207 (Miss. Ct. App. 2004); *see also* Lowery v. Harrison Co. Bd. of Supervisors, 891 So. 2d 264 (Miss. Ct. App. 2005) (stating that a gravel road, however dangerous, is not itself a dangerous condition without proof of violation of a standard or failure to inspect).

[142] *Jenkins,* 904 So. 2d at 1210-11.

[143] 929 So. 2d 398 (Miss. Ct. App. 2006).

[144] *Id.* at 408-09.

[145] *See, e.g.,* City of Natchez v. Jackson, 941 So. 2d 865, 869 (Miss. Ct. App. 2006) (stating that where a coal grate on a sidewalk was adjudged to be a dangerous condition because (a) the city was shown to have installed it, and (b) the city director of public works admitted that it constituted a "dangerous trip hazard").

ferred against the government, and a plaintiff must prove causation in each case in order to prevail under the purview of this exemption. For example, in *Hodges v. Madison County Medical Center*,[146] the plaintiff proved that the hospital bed upon which she was sitting collapsed because a shoe string, rather than a metal spring, had been used to support the mattress.[147] However, because the plaintiff failed to offer any proof that state employees substituted the string for the mattress, the court ruled that she could not prevail on her dangerous condition claim for lack of proof of causation.[148]

The proof of causation contemplated by the statute is proof of an act or omission by a governmental employee directly causing the dangerous condition. In *Mississippi Deptartment of Transportation v. Trosclair*,[149] the court found that the plaintiff had proved via eyewitness testimony that the government caused a dangerous condition by creating a three- to five-inch drop-off from the roadbed to the unpaved shoulder, failing to erect sufficient signs or signals to warn of that danger to the driving public, and denying the State's motion for summary judgment.[150]

C. Sufficient Notice and Opportunity to Protect or Warn

Once causation is demonstrated, the plaintiff must then offer proof that the entity knew of the dangerous condition, by either actual or constructive notice, in time to protect or warn the public of the danger. Four recent cases address this rather thorny issue.

In *Hodges*[151] it was held that, although a string had negligently been used to support a mattress in lieu of a spring, leading to the collapse of a bed and resulting injuries to the

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[146] 929 So. 2d 381 (Miss. Ct. App. 2006).

[147] *Id.* at 382.

[148] *Id.* at 384; *see also* Howard v. City of Biloxi, 943 So. 2d 751, 754 (Miss. Ct. App. 2006) (holding that the plaintiff's failure to prove that a crack in a sidewalk was caused by the negligent or wrongful conduct of the city doomed her claim).

[149] 851 So. 2d 408 (Miss. Ct. App. 2003).

[150] *Id.* at 413-14.

[151] Hodges v. Madison Co. Med. Ctr., 929 So. 2d 381 (Miss. Ct. App. 2006).

plaintiff, the plaintiff's failure to offer proof that the employees knew that the mattress was hanging by a thread defeated her dangerous condition claim.[152] By contrast, in *Ladner v. Stone County*,[153] where a county inspector sent notices twice a year for five years to the Board of Supervisors that a bridge in their county was advancing in decay, it was decided that the county had actual notice of the dangerous condition and sufficient time and money to repair the bridge or warn of its condition, and was thus liable for the injuries sustained by the plaintiff during the bridge's not unexpected collapse.[154]

In *City of Jackson v. Locklar*,[155] our highest court cited five-factors that are useful in determining whether constructive notice of a dangerous condition existed: (1) the length of time the defect existed; (2) the nature or character of the defect; (3) the publicity of the place where the defect existed; (4) the amount of travel over the area; and (5) any other factors in evidence which tend to show notoriety.[156] Considering those factors, the Mississippi Court of Appeals in *Jones v. Mississippi Transportation Company*[157] that a plaintiff's failure to offer proof that a roadway's shoulder defect was noticeable upon passing or that there had been any complaints filed by motorists concerning the defect, barred his claim of constructive notice of a dangerous condition. Similarly, in *Mississippi Deptartment of Wildlife, Fisheries and Parks v. Brannon*[158] the court determined that, in absence of proof that the park inspector had observed a drop-off covered by leaves, or that he had failed to make all required inspections to seek out any possible dangerous conditions, or that any had been previously reported, a plaintiff could not successfully advance a constructive notice claim.[159] By contrast, in *City of Jackson v. Internal*

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[152] *Id.* at 384.
[153] 939 So. 2d 270 (Miss. Ct. App. 2006).
[154] *Id.* at 276-77
[155] 431 So. 2d 475 (Miss. 1983).
[156] *Id.* at 480.
[157] 920 So. 2d 516 (Miss. Ct. App. 2006).
[158] 943 So. 2d 53 (Miss. Ct. App. 2006).
[159] *Id.* at 65-66.

Engine Parts Group, Inc.,[160] the Mississippi Supreme Court ruled that proof of the city's failure to inspect and maintain a drainage ditch, which later flooded because it was blocked when heavy rains came, constituted proof of actual notice of the long existing blockage which reasonable inspection and maintenance would have revealed.[161]

D. Open and Obvious

Once a plaintiff has proven the existence of a dangerous condition on governmental property that was caused by the government and of which the government had notice and opportunity to warn or protect against, then he must also prove that the condition was not open and obvious to any using due care. Although the open and obvious defense is not an absolute bar to claims in general tort law in comparative negligence states such as Mississippi, it is an absolute bar to recovery in claims brought under the auspices of the Mississippi Tort Claims Act.[162] The slippery slope that the plaintiff must negotiate with regard to this issue is: (a) if the condition was so open and obvious to the government that it had actual notice of the condition, perhaps it should also have been obvious to the plaintiff; and (b) if the condition was not open and obvious to the plaintiff, it may have been similarly disguised from the government.[163]

E. So What is a Plaintiff to do?

He or she should do as did the plaintiff in *City of Newton v. Lofton*[164] and offer proof of a condition hidden to the plain-

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[160] 903 So. 2d 60 (Miss. 2005).

[161] *Id.* at 65-66.

[162] See *Howard v. City of Biloxi*, 943 So. 2d 751, 756-57 (Miss. Ct. App. 2006) (citing Tharp v. Bunge Corp., 641 So. 2d 20, 24 (Miss. 1994) for the general rule and *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 64 (Miss. 2005) for the MTCA rule). The *Howard* court found that a sidewalk crack with 1" to 1 ½" of unevenness was an open and obvious danger for which the plaintiff pedestrian should have taken note and used caution when negotiating it.

[163] *See Brannon,* 943 So. 2d at 53.

[164] 840 So. 2d 833, 836 (Miss. Ct. App. 2003).

tiff but of which the government should have been aware by virtue of having created the condition or having constructive knowledge that it existed. In *Newton,* the court decided that a parking lot under repair containing dangers hidden by tall grass that had been created by the city, with no signs or devices surrounding the construction site warning that the construction was not completed, constituted a dangerous condition that was not open and obvious to the plaintiff.[165]

Conversely, in *City of Clinton v. Smith*,[166] where the plaintiff testified he observed an obviously dangerous condition, i.e., that he noted the presence of ice and snow on a ramp before he fell off of it, the Court ruled that he would not be able to overcome the immunity conferred by the dangerous condition exemption.[167]

The proof necessary to overcome the dangerous condition exemption is not insignificant, and making that proof usually requires making extensive use of pretrial discovery procedures. However, as Cicero did in preparing to prosecute the powerful Cataline in the trial that made Cicero the leading lawyer of his era, the lawyer asserting claims under the MTCA should utilize all available resources in support of efficaciously presenting a claim. That is, assuming he or she wishes to avoid summary judgment.

VIII. Conclusion

The road to justice under the auspices of Mississippi's Tort Claims Act has been a long and winding one, which our appellate courts have successfully navigated with only a minimal number of problematic twists and turns. In the final analysis, the middle ground has proven the high ground, where our courts have provided plaintiffs with a fair shot at recovery and given governmental entities their due with regard to pre-suit notice and immunizing defenses. It was a distinct pleasure to be so intimately involved in this navigation of Mississippi's

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[165] *Id.* at 836.
[166] 861 So. 2d 323 (Miss. 2003).
[167] *Id.* at 327.

Tort Claims Act waters during the past ten years, and to labor in the company of so many outstanding lawyers and hard working public servants, while receiving guidance from an abundance of learned trial and appellate state and federal judges.

The struggle for Tort Claims Act justice will continue, and future shifts in the form of landmark decisions are as inevitable in Mississippi as they are in other states. However, the combatants and deciders alike may take pride in knowing that Mississippi's legislators, courts, lawyers and the voting public have worked together to craft a Tort Claims Act and supporting body of law that is the equal of any other in our nation. Even more, it stands as a shining example, in these perilous times, of how American democracy can and does work for the good of all, despite the attempts of a few self-interested ones within and the many misguided ones without who seek to denigrate or destroy it.

A REVIEW OF MISSISSIPPI LAW REGARDING ARBITRATION

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I. Introduction

Arbitration, a form of alternative dispute resolution, involves a contractual provision whereby bound parties give up their right to have their dispute heard by a court of law and, instead, submit their grievances to a neutral arbitrator who will ultimately decide the merits of the cause of action. Most commonly, agreements to arbitrate are compulsory and binding; however, depending on the agreement between the parties, arbitration may be voluntary and non-binding. Although at one time arbitration agreements were almost exclusively used by sophisticated businesspeople, arbitration agreements are now commonly imposed upon consumers involved in everyday transactions such as purchasing a car, contracting for employment, obtaining a credit card, or entering a nursing home. As a result, the precedent interpreting and analyzing arbitration agreements is steadily growing as Mississippi courts are asked to evaluate the ever-evolving set of circumstances which make an agreement to arbitrate ironclad versus invalid.

II. The History of the Federal Arbitration Act

"The cornerstone of United States arbitration law is the Federal Arbitration Act (the "FAA")."[1] In 1925, Congress, in

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[1] North American Free Trade Agreement [NAFTA], Advisory Comm. on Pri-

exercising its Commerce Power, enacted the FAA "to 'revers[e] centuries of judicial hostility to arbitration agreements, by plac[ing] arbitration agreements upon the same footing as other contracts.'"[2] It was Congress's purpose in enacting the FAA to establish a broad "'federal policy favoring arbitration,'" and to require all courts to "'rigorously enforce agreements to arbitrate.'"[3] Section 2 of the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

As a result, the FAA applies to any arbitration clause in a written contract involving commerce—an extremely broad test which encompasses a vast majority of commercial transactions. Indeed, the language "involving commerce" has been viewed by United States Supreme Court as equivalent to "'affecting'" interstate commerce.[5] Previous precedent has clearly stated that all doubts concerning the scope of arbitrable issues, the construction of the contract language, and the asserted defenses to arbitration "[must] be resolved in favor of arbitration."[6]

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vate Commercial Disputes, *Summary of U.S. Arbitration Law* (June 1995) (prepared by Deborah Enix-Ross & David W. Rivkin) *available at* http://www.mac.doc.gov/nafta/usarb.htm; *see also* 9 U.S.C. §§ 1-16 (2000).

[2] Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 225-26 (1987) (citation omitted) (alterations in original) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974)).

[3] *Id.* at 226 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)). *See generally* Janet Lee Herold, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 54 MISS. L.J. 571 (1984).

[4] 9 U.S.C. § 2 (2000).

[5] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995).

[6] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

State laws govern only to the extent that they do not conflict with the FAA.[7] Consequently, state courts have often been quoted as affirming that there is a "strong federal policy" in favor of arbitration.[8] While state law principles may invalidate an arbitration provision, any state law that blatantly disfavors the enforcement of arbitration agreements will be preempted by the FAA.

The United States Supreme Court has specifically addressed the role of state courts in the context of the FAA:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.[9]

Although the FAA strongly urges courts to enforce agreements to arbitrate, Congress clearly did intend for arbitration agreements to be invalidated in some circumstances. Specifically, arbitration agreements are invalid "upon [the assertion by a party of] such grounds as exist at law or in equity for the revocation of any contract."[10] The burden of establishing an alleged defense to the enforcement of an arbitration provision is placed squarely upon the shoulders of the party opposing arbitration.[11] Common grounds for invalidation may include allegations of substantive or procedural unconscionability, waiver, fraud or duress, and failure of consideration.

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[7] *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding for the first time that the conflicting state statute was preempted and instead federal law applied).

[8] *See, e.g.*, MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 175 (Miss. 2006).

[9] *Allied-Bruce*, 513 U.S. at 281 (citation omitted) (emphasis omitted) (quoting 9 U.S.C. § 2 (2000)).

[10] 9 U.S.C. § 2.

[11] Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533, 539 (5th Cir. 2003).

Although the FAA does not delve into detailed procedures surrounding arbitration, it does give some overall guidance. For example, once a suit has been initiated in a United States court, the FAA provides for a stay of court proceedings upon the determination that the suit is "referable to arbitration."[12] The stay shall be granted "on application of one of the parties [to] stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[13] This procedure is most commonly seen when, after being sued by a plaintiff, a defendant files a motion to compel arbitration and stay proceedings or a similar request. If the trial court determines that the litigable issue is within the scope of an arbitration agreement which involves interstate commerce, and no contractual defenses to the agreement are present, the court will refer the matter to arbitration and the court action will be stayed. Once arbitration is complete, the court is granted the authority to confirm and enforce the arbitration award.[14] On the other hand, if a court finds that an issue is not arbitrable, regular litigation will ensue.

If a matter is referred to arbitration, the FAA still provides some safeguards to ensure the fundamental fairness of the proceedings. Federal law allows a court to vacate an award where there are findings of fraud, corruption, partiality and misconduct.[15] Additionally, federal courts have the power to modify and correct awards where miscalculation and other "material mistake[s]" are "evident."[16]

Since 1925, Congress has maintained a steadfast position with regards to the FAA. Combined with the consistently strong precedent of the United States Supreme Court which has followed, it is difficult to dispute that a national policy favoring arbitration exists. As a result, to date, most states have followed suit and enacted legislation which is favorable to

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[12] 9 U.S.C. § 3 (2000).
[13] *Id.*
[14] *Id.* § 9.
[15] *Id.* § 10.
[16] *Id.* § 11.

arbitration.[17]

III. The Advent of Arbitration in Mississippi

"Arbitration is a form of dispute resolution that has not been widely used in Mississippi."[18] Even though the FAA was enacted by Congress in 1925 and arbitration was recognized by Mississippi statutes as early as 1892,[19] Mississippi common law circumvented the general enforcement of arbitration agreements until 1998. Until that time, Mississippi courts consistently held that mere "'private persons cannot[] by a contract to arbitrate oust the jurisdiction of the legally constituted courts.'"[20] In sum, "all published Mississippi Supreme Court opinions employed the logic that pre-dispute arbitration agreements [were] invalid because they divest our courts of jurisdiction."[21] Employing this view, a party to an arbitration agreement could "fish with hope for a favorable award in a common law arbitration, but when he comes to doubt that the arbitrator will go in his favor, he may, if he wishes to do so, revoke by the notice."[22] As recently as 1995, Mississippi courts still recognized and enforced this general bar to agreements to arbitrate.[23]

Interestingly, in Mississippi, parties to construction contracts have had the right to enforce agreements to arbitrate since the 1980s. In 1981, the legislature enacted the Mississippi Construction Arbitration Act which gives binding effect to

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[17] *Summary of U.S. Arbitration Law*, *supra* note 1.

[18] David Ott, *An Overview of Mississippi's Construction Arbitration Act*, 53 Miss. L.J. 501, 501 (1983).

[19] Miss. Code Ann. ch. 6, §§ 95-113 (1892).

[20] McClendon v. Shutt, 115 So. 2d 740, 741 (Miss. 1959) (citation omitted), *overruled by* IP Timberlands Operating Co. v. Denmis Corp., 726 So. 2d 96 (Miss. 1998).

[21] R. Pepper Crutcher, Jr., *Overcoming Mississippi's Common Law Hostility to Arbitration*, The Federalist Society, http://www.fed-soc.org/Publications/practicegroupnewsletters/PG%20Links/pepper.htm (last visited Mar. 20, 2007).

[22] Wesley A. Sturges, *Arbitration and Award*, 25 Miss. L.J. 181, 183 (1954).

[23] *E.g.*, Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 118 (N.D. Miss. 1995).

arbitration provisions included specifically in construction related contracts.[24]

In 1998, the tides of tradition turned when the Mississippi Supreme Court decided the landmark case of *IP Timberlands Operating Co. v. Denmiss Corp.*[25] In *Denmiss*, the court frankly acknowledged Mississippi's long-standing common law anti-arbitration doctrine; however, the court recognized that "'[i]f there be any type of arbitration award we should be loathe to disturb, it should be that between private contracting parties respecting a matter of interest only to themselves and their respective pocket books.'"[26] Most importantly, the court overruled previous precedent and stated that

> [t]his Court hereby overturns the former line of case law that jealously guarded the court's jurisdiction. Again, we expressly state that this Court will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution.[27]

Since *Denmiss*, Mississippi courts have continued to analyze and expand the case law interpreting arbitration agreements. Although enforcement of pre-dispute arbitration agreements is still a relatively new concept, since 1998, Mississippi appellate courts have kept their word by fairly and consistently enforcing agreements to arbitrate.

IV. The Test

Although the *Denmiss* court succeeded in lifting the ban on the enforcement of pre-dispute arbitration agreements, the issue of whether a particular claim is arbitrable must still be

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[24] Miss. Code Ann. §§ 11-15-101 to -143 (2004).

[25] 726 So. 2d 96 (Miss. 1998) (overruling McClendon v. Shutt, 115 So. 2d 740 (Miss. 1959); Mach. Prods. Co. v. Prairie Local Lodge No. 1538 of Int'l Ass'n of Machinists, 94 So. 2d 344 (Miss. 1957); Standard Millwork & Supply Co. v. Miss. Steel & Iron Co., 38 So. 2d 448 (Miss. 1949); Jones v. Harris, 59 Miss. 214 (1881)).

[26] *Denmiss*, 726 So. 2d at 104 (quoting Craig v. Barber, 524 So. 2d 974, 977 (Miss. 1988)).

[27] *Id.*

determined before arbitration can be ordered. Courts are prevented from looking into the merits of a case until this threshold question has been decided. "In addition to establishing a strong presumption in favor of arbitration, the [FAA] also limits the role of the court to determining whether an issue is arbitrable. . . . Once that determination is made, the court may not delve further into the dispute."[28] In *United Steelworkers of America v. American Manufacturing Co.*, the United States Supreme Court went so far as to state that courts "have no business weighing the merits of the grievance" when the matter is referable to arbitration.[29] In *East Ford, Inc. v. Taylor*, the Mississippi Supreme Court first declared the test to be applied by a court when determining whether a claim is arbitrable.[30] However, the true analysis was best expressed by the Court in *MS Credit Center, Inc. v. Horton*.[31] The test states that

> [i]n determining the applicability of the FAA, and whether its provisions require the parties in a particular case to arbitrate their claims, we conduct a two-prong inquiry. The first prong requires a threshold finding that the agreement to be arbitrated must have a nexus to interstate commerce, followed by a finding that the dispute in question is arbitrable, that is, the terms of the arbitration agreement require the parties to arbitrate the kind of dispute involved in the litigation. The second prong addresses whether legal constraints external to the agreement, such as fraud, duress, or unconscionability, foreclose arbitration of the claims.[32]

Although Mississippi courts have declared this test to be a two-pronged inquiry, for ease of understanding, this paper will discuss the test in three parts.

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[28] *Id.* at 108.

[29] 363 U.S. 564, 568 (1960).

[30] 826 So. 2d 709, 713 (Miss. 2002).

[31] 926 So. 2d 167, 175 (Miss. 2006).

[32] *Id.* at 175 (citations omitted) (quoting *E. Ford, Inc.*, 826 So. 2d at 713, 716; 9 U.S.C. § 2 (2000)).

A. Whether the Agreement to be Arbitrated has a Nexus to Interstate Commerce

In general, "'[t]he sine qua non of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute *in a contract which evidences a transaction in interstate commerce.*'"[33] Over the years, what constitutes a transaction in interstate commerce has been the subject of much debate. In *Allied-Bruce Terminix Companies v. Dobson*, the United States Supreme Court held that the language "evidencing a transaction in interstate commerce" should be read "broadly" to result in "a full exercise of constitutional power."[34] The Court found "that the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'"[35] In *McKenzie Check Advance of Mississippi, LLC v. Hardy,*[36] the Mississippi Supreme Court, citing *Allied-Bruce*, affirmed their acceptance of the Court's commerce in fact interpretation of "involving interstate commerce."[37] Indeed, regardless of the parties' contemplation of interstate commerce involvement, a nexus to interstate commerce may be found if the transaction simply affects commerce.

Since *Denmiss*, the Mississippi Supreme Court has followed the *Allied-Bruce* precedent and has interpreted the broad language of the FAA to reach a variety of transactions. Beginning with *Denmiss*, the court "easily recognize[d] that the timber industry, on a national level, meets the minimum threshold of affecting or bearing upon interstate commerce, and thus initiating the Federal Arbitration Act."[38] The court rationalized this finding by stating that both parties to the agreement "held forest lands in multiple states."[39] In *Smith Barney v. Henry*, a beneficiary of a securities account was compelled to arbitrate her claims against the securities firm when the court

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[33] *Denmiss*, 726 So. 2d at 107 (emphasis added) (quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 n.4 (4th Cir. 1989).

[34] 513 U.S. 265, 277 (1995).

[35] *Id.* at 273-74.

[36] 866 So. 2d 446 (Miss. 2004).

[37] *Id.* at 451.

[38] *Denmiss*, 726 So. 2d at 107.

[39] *Id.*

"easily recognize[d] that the securities industry, on a national level, meets the minimum threshold of affecting or bearing upon interstate commerce."[40]

In *Russell v. Performance Toyota, Inc.*, a pickup truck purchaser sued his dealership alleging various tort claims related to his purchase.[41] The court held that "[b]ecause Performance Toyota is a Tennessee corporation with its principal place of business in Memphis, Tennessee, and Russell is an adult resident citizen of Lee County, Mississippi, . . . this matter 'evidences a transaction in interstate commerce.'"[42] A short time later, the court decided *East Ford, Inc v. Taylor*,[43] which was based on facts similar to *Russell*. In *East Ford, Inc.*, a truck buyer sued the seller of a vehicle alleging misrepresentation of the vehicle as new; however, upon discussing the applicability of the FAA, the court stated that the first prong of the test was not in dispute and, therefore, declined to discuss whether the location and residency of the parties would determine whether interstate commerce was affected or whether the automobile industry in general met the minimum standard for affecting interstate commerce.[44] In 2007, the court decided the case of *Greater Canton Ford Mercury, Inc. v. Ables* and stated, albeit in dicta, that "[t]he fraudulent actions alleged by Plaintiffs resulted in the purchase of vehicles, a transaction involving commerce."[45] As a result, there may be some question as to whether the purchaser of a vehicle from a dealership within the same state will be considered a transaction involving interstate commerce so as to trigger the applicability of the FAA. Although there are arguments available for both positions, it is probable that the automobile industry in general, like the timber and securities industries, will be found to affect interstate commerce.

In *University Nursing Associates, PLLC v. Phillips*, the

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[40] 775 So. 2d 722, 725 (Miss. 2001).
[41] 826 So. 2d 719, 721 (Miss. 2002).
[42] *Id.* at 722.
[43] 826 So. 2d 709 (Miss. 2002).
[44] *Id.* at 713.
[45] 948 So. 2d 417 (Miss. 2007).

court acknowledged in a footnote that an employment dispute between a state university and one of its faculty members does not involve interstate commerce, and, as a result, the FAA may not apply to the dispute.[46]

In *McKenzie Check Advance of Mississippi, LLC v. Hardy*, the court held that a nexus to interstate commerce existed in a dispute between borrowers and lenders under payday loan contracts where lenders in financing transactions must comply with federal laws and regulations such as the Truth-in-Lending Act.[47] Incidentally, the Truth-in-Lending Act was promulgated by Congress under its Commerce Clause powers.[48] Relying again on the Truth-in-Lending Act, the court reaffirmed its position in *Speedee Cash of Mississippi, Inc. v. Williams*.[49] In *Speedee Cash*, the court stated that "[i]t is elementary to find that the contract affects interstate commerce inasmuch as Speedee Cash, a lender of money to consumers, must run its business in accordance with federal laws and regulations."[50] The court later applied this same logic consistently in *Equifirst Corp. v. Jackson*,[51] and *MS Credit Center v. Horton*.[52]

In *Vicksburg Partners, L.P. v. Stephens*, the court, faced with compelling arbitration of a wrongful death action against a nursing home, held that "[t]his case clearly falls within the broad purview of the Federal Arbitration Act. Accordingly, singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce."[53] The court went on to explain that "basic daily activities like receiving supplies from out-of-state vendors and payments from

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[46] 842 So. 2d 1270, 1276 n.6 (Miss. 2003). *But see* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (applying FAA to employment contracts where interstate commerce was not obviously implicated).

[47] 866 So. 2d 446, 451 (Miss. 2004).

[48] *Id.*

[49] 915 So. 2d 1061 (Miss. 2005).

[50] *Id.* at 1062-63.

[51] 920 So. 2d 458, 462-63 (Miss. 2006) (finding interstate commerce affected in home mortgage transactions).

[52] 926 So. 2d 167, 175-76 (Miss. 2006) (finding loan contracts for purchase of credit life and disability insurance involved commerce).

[53] 911 So. 2d 507, 515 (Miss. 2005).

out-of-state insurance companies or the federal Medicare program, affect interstate commerce."[54] In a more recent nursing home case, *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Lambert*, the court continued to resonate this view regarding admission agreements "because admission agreements, when taken in the aggregate, affect interstate commerce, thus bringing such contracts within the scope of the Federal Arbitration Act (FAA)."[55]

Finally, in *Cleveland v. Mann*, the court, in a matter of first impression, compelled parties to arbitrate a wrongful death suit brought against a surgeon and the surgeon's professional association after the patient signed an arbitration agreement prior to surgery.[56] The court, relying on its previous analysis in *Vicksburg Partners, L.P.*, found that medical services provided to a patient by a doctor were economic activities that affect interstate commerce.[57]

In the past, Congress and the United States Supreme Court have clearly stated their intent for the FAA to possess an expansive reach. Consequently, there does not appear to be a single Mississippi case where the court has ruled the FAA inapplicable due to the fact that interstate commerce is not implicated. Given the fact that the Mississippi appellate courts have already determined that interstate commerce is implicated in each of the varied circumstances discussed above, it is hard to imagine a set of facts whereby interstate commerce would not be at issue, and thus make the dispute outside the purview of the FAA.

B. Whether the Terms of the Arbitration Agreement Require the Parties to Arbitrate the Kind of Dispute Involved in the Litigation

Once the threshold question regarding the effect on inter-

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[54] *Id.*

[55] No. 2005-CA-02223-COA, 2006 WL 3593437, at *2 (Miss. Ct. App. Dec. 12, 2006).

[56] 942 So. 2d 108, 111 (Miss. 2006).

[57] *Id.* at 112-13.

state commerce is resolved, the next portion of the test involves a determination as to the scope of the arbitration clause. Literally, the language employed in the arbitration clause is examined to determine whether the clause, by its own terms, requires the parties to arbitrate the particular dispute at issue. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the United States Supreme Court labeled the terminology "'[a]ny controversy or claim arising out of or related to this [a]greement'" as a broad arbitration clause in that the language "arising out of or related to" covers both the "execution" and "acceleration" of the agreement.[58] Later, in *Pennzoil Exploration & Production Co. v. Ramco Energy Ltd.*, the Fifth Circuit made its own distinction between broad and narrow arbitration clauses, stating that a clause is narrow when it limits arbitration to claims which "'arise under the contract.'"[59] Additionally, "[b]ecause broad arbitration language is capable of expansive reach, courts have held that 'it is only necessary that the dispute 'touch' matters covered by [the contract] to be arbitrable.'"[60]

In considering whether tort claims may be subjected to arbitration, Mississippi courts have dealt with very few cases on the issue. In *Adams v. Greenpoint Credit, LLC*,[61] the court found that a borrower's tort claims of fraud, negligence, intentional and/or negligent infliction of mental and emotional distress, breach of contract, and defamation were subject to arbitration under the following arbitration clause:

> "Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or aris-

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[58] 388 U.S. 395, 406 (1967) (first alteration in original) (quoting parties' arbitration contract).

[59] 139 F.3d 1061, 1067 (5th Cir. 1998).

[60] MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 176 (Miss. 2006) (citing *Pennzoil*, 139 F.3d at 1068).

[61] 943 So. 2d 710, 713-15 (Miss. Ct. App. 2006), *aff'd in part and vacated in part*, 943 So. 2d 703 (Miss. 2006); *see also* Adams v. Greenpoint Credit, LLC, 943 So. 2d 703 (Miss. 2006).

ing from an alleged tort."[62]

Although the borrower argued that the arbitration agreement did not apply to his claims because he did not intend for the contract to cover tort claims (although tort claims were specifically mentioned), the Mississippi Court of Appeals cited a Fifth Circuit decision in finding that "'[p]arties to arbitration agreements cannot avoid them by casting their claims in tort, rather than contract.'"[63] In *Speedee Cash of Mississippi, Inc. v. Williams*,[64] the Mississippi Supreme Court compelled arbitration of a borrower's tort claims of wrongful repossession, conversion, trespass, loss of income, and damage to business reputation against a lender under an extremely broad arbitration clause which stated that

> [t]his arbitration agreement shall cover all claims whatsoever pertaining in any way to any dwelling, transaction, or activities between the parties, including the arbitrability of any claim, regardless of whether they are based upon contract, tort, or otherwise and regardless of whether they are assertable at law, in equity or otherwise.[65]

Utilizing the standard set forth by the Fifth Circuit in *Pennzoil*, this arbitration clause was broad in that it did not limit arbitration to claims "aris[ing] out of . . . [the] [a]greement."[66] Instead, the clause was aimed at encompassing "all claims whatsoever pertaining in any way to . . . activities between the parties."[67] Again, the arbitration clause specifically included tort claims, so it was no surprise when the court compelled arbitration. Finally, in *Terminix International, Inc. v. Rice*, the court compelled homeowners to arbitrate their tort claims against a termite company, stating that "it is with-

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[62] *Adams*, 943 So. 2d at 713 (quoting parties' arbitration contract).

[63] *Id.* at 714 (alteration in original) (quoting Palmer v. Conseco Fin. Servicing Corp., 198 F. Supp. 2d 822, 825 (N.D. Miss. 2002).

[64] 915 So. 2d 1061 (Miss. 2005).

[65] *Id.* at 1062.

[66] Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1063 (5th Cir. 1998).

[67] *Speedee Cash of Miss., Inc.*, 915 So. 2d. at 1062.

out question that the Rices' claims are within the scope of the arbitration provision, as they are claims and controversies that directly challenge Terminix's performance of the contract."[68] However, the reported version of the case does not recite the text of the arbitration provision.[69] In *Cleveland v. Mann*, the Mississippi Supreme Court compelled arbitration of a wrongful death action and stated that the tort claim was within the scope of the arbitration agreement which provided that the patient would arbitrate any dispute "'relating to the performance of medical services.'"[70] The theme of each of these tort-related cases seems to be that the torts themselves directly relate to performance under the contracts and, as such, were explicitly agreed to and contemplated by the parties upon execution of the contract.

Consequently, in *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, the Mississippi Supreme Court held that the purchaser of a sport utility vehicle did not agree to arbitrate claims of invasion of privacy, negligent hiring and supervision, civil fraud, and intentional and negligent infliction of emotional distress and mental anguish because such claims were outside the scope of the arbitration agreement.[71] On appeal, the plaintiff argued that no consumer in an arms-length negotiation, absent duress, would contract away his constitutional rights to judicial redress and a jury trial when making a purchase if he believed it gave the merchant the green light to commit fraud, forgery, and identity theft, while at the same time precluding the consumer from having his day in court.[72] The court, in return, stated:

> While Blakeney no doubt agreed to arbitrate claims that originated from the sale of the vehicle or related to the sale of the vehicle, no reasonable person would agree to submit to

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[68] 904 So. 2d 1051, 1055 (Miss. 2004).

[69] *Id.* at 1053-59.

[70] 942 So. 2d 108, 118 (Miss. 2006) (emphasis omitted) (quoting parties' arbitration contract).

[71] No. 2005-IA-00125-SCT, 2007 WL 529281, at *6-7 (Miss. Ct. App. Feb. 22, 2007).

[72] *Id.* at *6.

> arbitration any claims concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles; and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased and forging his name on fake titles and bills of sale on various stolen vehicles-actions of which Blakeney was presumedly totally unaware at the time of the execution of the documents in question, including the arbitration agreement.[73]

With the advent of the decision in *Rogers-Dabbs Chevrolet-Hummer, Inc.*, the court is clearly looking more closely into what the parties might have reasonably contemplated to fall within the scope of the arbitration agreement.[74]

With regards to scope, the Mississippi Supreme Court has also dealt with questions involving retroactive application of agreements and application of arbitration as a condition precedent to litigation. In *B.C. Rogers Poultry, Inc. v. Wedgeworth*, as a matter of first impression, the court held that the scope of the arbitration clause did not retroactively apply to disputes which pre-dated the date of the arbitration agreement.[75] The court stated that the clause "is focused only on those disputes arising under the February 5, 1997, Broiler Growing Agreement" and "does not include broader language that might be construed or interpreted to cover earlier disputes between the parties."[76] In *Doleac v. Real Estate Professionals, LLC*, as a matter of first impression, an arbitration clause in an asset purchase agreement which required arbitration of claims between the parties prior to litigation was found by the court to be valid and binding.[77] The clause stated that "'[a]ny dispute under this agreement, *prior to litigation*, shall be submitted to arbitration.'"[78] Consequently, parties to an arbitration agreement may agree to arbitration as a condition precedent to liti-

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[73] *Id.*
[74] *Id.*
[75] 911 So. 2d 483, 488 (Miss. 2005).
[76] *Id.*
[77] 911 So. 2d 496, 501-02 (Miss. 2005).
[78] *Id.* at 501 (alteration in original) (quoting parties' arbitration contract).

gation.

Although Mississippi case law interpreting the scope of arbitration agreements is a growing area, previous court decisions have indicated that scope, like interstate commerce, is broadly construed. As a result, the first prong of the test for arbitrability of claims has been easily met in the past by those seeking arbitration. However, in light of the fact that arbitration agreements are increasingly imposed on consumers on a "take-it-or-leave-it" basis, development of the law interpreting scope of arbitration agreements is bound to occur in the future.

C. Whether Legal Constraints External to the Agreement Foreclose Arbitration of the Claims

The United States Supreme Court has stated that the second prong in the test to determine the validity of a motion to compel arbitration under the Federal Arbitration Act is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."[79] The Mississippi Supreme Court has consistently stated that courts should apply state-law contract principles in considering the second prong of the arbitration test.[80] Specifically, the court has held that "the usual defenses to a contract such as fraud, unconscionability, duress, and lack of consideration may be applied to invalidate an arbitration agreement."[81]

The courts have held that "[t]he party resisting arbitration

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[79] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[80] Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417 (Miss. 2007); Adams v. Greenpoint Credit, LLC, 943 So. 2d 710, 715 (Miss. Ct. App. 2006), *aff'd in part and vacated in part*, 943 So. 2d 703 (Miss. 2006) ("Courts decide whether the parties have agreed to arbitrate, and ordinary state-law principles determining the formation of contracts apply.") (citing Will-Dill Res., Inc. v. Samson Res., Co., 352 F.3d 211, 214 (5th Cir. 2003)); *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002).

[81] *E. Ford, Inc.*, 826 So. 2d at 714. *See generally* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996) (holding that "generally applicable [state law] contract defenses" are permissible when a party attempts to invalidate an arbitration agreement, but "state laws [that are] applicable *only* in arbitration provisions" are invalid).

must shoulder the burden of proving a defense to arbitration."[82] In one case, the court held that since the plaintiffs did not assert any contract defenses, there were no legal constraints external to the agreement between the parties that would foreclose the applicability of the arbitration agreement.[83]

Though the law is clear that fraud and duress are contract defenses that may be used to invalidate an arbitration provision, there appear to be no Mississippi state law cases discussing fraud or duress as a defense in the arbitration context. The most common defense to the enforceability of arbitration agreements in Mississippi case law is the defense of unconscionability. As such, unconscionability will be discussed first and will be followed by a discussion of cases involving the defenses of waiver, lack of consideration, and the applicability of arbitration agreements to non-signatories.

1. Unconscionability

The courts have stated that "[u]nconscionability is defined as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.'"[84] Also, an unconscionable contract has been described as "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other."[85] The courts have further held that there are "two types of unconscionability, procedural and substantive."[86] The court has defined

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[82] Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1193 (Miss. 2005) (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000)).

[83] *Ables*, 948 So. 2d 417.

[84] Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert, No. 2005-CA-02223-COA, 2006 WL 3593437, at *4 (Miss. Ct. App. Dec. 12, 2006) (quoting Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998)); *see also* Vicksburg Partners, LP v. Stephens, 911 So. 2d 507, 516-17 (Miss. 2005); *E. Ford, Inc.*, 826 So. 2d at 715.

[85] *Covenant Health & Rehab. of Picayune, LP*, 2006 WL 3593437, at *4 (quoting Terre Haute Cooperage v. Branscome, 35 So. 2d 537, 541 (Miss. 1948)).

[86] *E. Ford, Inc.*, 826 So. 2d at 714 (quoting Pridgen v. Green Tree Fin. Servic-

procedural and substantive unconscionability as follows:

> Procedural unconscionability may be proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."
>
> Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive. Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies.[87]

Consistent with the Mississippi appellate courts' holdings that the party resisting arbitration bears the burden to prove a defense, the Mississippi Supreme Court held that the lenders/defendants in *McDonald* "d[id] not have the burden to prove lack of unconscionability."[88] Furthermore, the burden is on the party seeking to uphold the arbitration provision to show that there is a reasonable relationship between the risks and needs of the business and the arbitration provision.[89]

Mississippi courts have also held that a party cannot raise the defense of unconscionability of an arbitration agreement for the first time on appeal.[90] Lastly, all unconscionability concerns are viewed by the court under the circumstances existing at the time the contract was created.[91]

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ing Corp., 88 F. Supp. 2d 655, 657 (S.D. Miss. 2000)).

[87] *Id.* (quoting *Pridgen*, 88 F. Supp. 2d at 657; York v. Georgia-Pac. Corp., 585 F. Supp. 1265, 1278 (N.D. Miss. 1984)); *see also* Cleveland v. Mann, 942 So. 2d 108 (Miss. 2006).

[88] Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1193 (Miss. 2005).

[89] *Covenant Health & Rehab. of Picayune, LP*, 2006 WL 3593437, at *4.

[90] *See* Speedee Cash of Miss., Inc. v. Williams, 915 So. 2d 1061, 1063 (Miss. 2005).

[91] *See* Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 517 (Miss. 2005) (citing *Pridgen*, 88 F. Supp. 2d at 657).

a. Procedural Unconscionability

The Mississippi Supreme Court has cited *Black's Law Dictionary* in stating that procedural unconscionability "looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation."[92] The court has recognized that there are primarily two factors which indicate a finding of procedural unconscionability: (1) a lack of knowledge and (2) a lack of voluntariness.[93] A lack of knowledge is said to be "'demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms.'"[94] A lack of voluntariness is said to be

> demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.[95]

The court has held that a finding of "procedural unconscionability *must* be substantiated by evidence of a lack of knowledge or voluntariness by the weaker party," even in a case where a nursing home resident may not have been allowed admission into the nursing home had he not signed the admission agreement containing an arbitration provision.[96]

The Mississippi Supreme Court has stated that even if a

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[92] *Id.* at 517 (citing BLACK'S LAW DICTIONARY 1524 (6th ed. 1990)).

[93] E. Ford, Inc. v. Taylor, 826 So. 2d 709, 715 (quoting Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109-10 (D. Miss. 1979)); *see also Mann*, 942 So. 2d at 114.

[94] *E. Ford, Inc.*, 826 So. 2d at 715-16 (quoting *Holyfield*, 476 F. Supp. at 109-10).

[95] *Id.* at 716 (quoting *Holyfield*, 476 F. Supp. at 109-10).

[96] *Vicksburg Partners, L.P.*, 911 So. 2d at 520 (emphasis added) (holding plaintiffs were competent individuals signing an agreement stating that any disputes would be resolved by arbitration and this was presented in a "well-marked, highly visible" manner).

trial court makes a finding that an arbitration provision is an adhesion contract, the "court must still determine whether the arbitration clause included in a contract of adhesion renders the agreement/contract unconscionable."[97] The courts have the ability to restrict enforcement of terms within a contract that may specifically be unconscionable.[98] The court noted that contracts of adhesion are drafted by the dominant party and the weaker party has no ability to negotiate the terms of the contract.[99] In further discussing arbitration agreements and adhesion contracts, the court stated:

> The fact that an arbitration agreement is included in a contract of adhesion renders the agreement procedurally unconscionable only where the stronger party's terms are unnegotiable and "the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all."[100]

In *Russell v. Performance Toyota, Inc.*, the plaintiff "complain[ed] that the arbitration agreement was 'unilateral' and inequitable because he was a consumer and Performance Toyota was a corporation with a much greater bargaining position."[101] The plaintiff further stated that he was unable to negotiate the terms of the contract because he was not on "equal footing" with the defendant corporation.[102] The court ruled that the plaintiff was not "coerced into signing [the contract]", and there were many other dealerships where he could have

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[97] *Id.* at 516; *see also* Hughes Training, Inc. v. Cook, 254 F.3d 588, 594 (5th Cir. 2001) ("[C]ontracts of adhesion[] *are not automatically void.*") (emphasis added); Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1194 (Miss. 2005) ("An arbitration agreement may not be labeled unconscionable simply because it carries with it aspects of adhesion.") (citing *E. Ford, Inc.*, 826 So. 2d at 716).

[98] *McDonald*, 905 So. 2d at 1194.

[99] *E. Ford, Inc.*, 826 So. 2d at 716.

[100] *Id.* (quoting Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998)).

[101] 826 So. 2d 719, 725 (Miss. 2000).

[102] *Id.*

made his automobile purchase.[103] The court also stated, "In Mississippi, a person is charged with knowing the contents of any document that he executes."[104] The court concluded by holding that the arbitration agreement not only benefited the corporate defendant, but benefited both parties.[105] The agreement could not be construed in any way to protect the drafter from any potential negligence claims.[106] Lastly, the court held that the plaintiff failed to prove that the arbitration agreement would subject him to "'an unreasonable risk[].'"[107]

In *EquiFirst Corp. v. Jackson*, the Mississippi Supreme Court held that arbitration riders executed by home mortgagers at a loan closing were not procedurally unconscionable despite one plaintiff's contention that he had difficulty reading and the other plaintiff's contention that she felt hurried during the loan closing.[108] The court held that such arguments were without merit because the reading-impaired plaintiff did not inform anyone at the loan closing of his reading difficulties and because the plaintiffs were given approximately a week's notice of the loan closing date and time and should not have felt hurried as a result.[109]

The court specifically held in *Cleveland v. Mann* that a person's inability to read does not make him or her incapable of having knowledge about an arbitration agreement he or she signed.[110] In *Mann*, the court stated that the arbitration agreement language was "neither complex nor convoluted."[111] The court pointed out that the pertinent language regarding

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[103] *Id.* at 726.

[104] *Id.* (citing J.R. Watkins Co. v. Runnels, 172 So. 2d 567, 571 (Miss. 1965)); *see also* Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1056 (Miss. 2004) ("It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it.") (citing McKenzie Check Advance of Miss., LLC v. Hardy, 866 So. 2d 446, 455 (Miss. 2004)).

[105] *Russell*, 826 So. 2d at 726.

[106] *Id.*

[107] *Id.* at 726-27.

[108] 920 So. 2d 458, 463-64 (Miss. 2006).

[109] *Id.* at 464. In support of its holding, the court cited *McKenzie Check Advance of Miss., LLC* and *McDonald.*

[110] 942 So. 2d 108, 114 (Miss. 2006) (citing *Equifirst Corp.*, 920 So. 2d at 464).

[111] 942 So. 2d at 115.

the plaintiff giving up his right to a trial by jury was "boldly printed in all capital letters in a font larger than the font in the rest of the agreement."[112] Furthermore, the court noted that the second page of the arbitration agreement fully explained and described the terms of the arbitration agreement.[113] The court also cited an early Mississippi Supreme Court opinion stating, "[a] person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him."[114] The court concluded that the arbitration agreement was not procedurally unconscionable and noted that the plaintiff signed the first page of the agreement and put his initials on the second page "denoting his understanding" as to the terms of the agreement.[115] The plaintiffs in *Mann* also asserted the arbitration agreement was procedurally unconscionable due to a lack of voluntariness.[116] The plaintiffs asserted the arbitration agreement constituted an adhesion contract.[117] The court defined a contract of an adhesion as "an agreement 'drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms.'"[118] The court further noted that adhesion contracts generally contain provisions in very small font and are usually pre-printed agreements.[119] The court held that the plaintiffs' claim of lack of voluntariness was without merit.[120] The court based its reasoning on the fact the plaintiff initialed on the second page of the agreement indicating he was not in need of emergency care or under stress.[121] Additionally, the agreement allowed for the plaintiff to resend the agreement within

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[112] *Id.*

[113] *Id.*

[114] *Id.* (alteration in original) (quoting Cont'l Jewelry Co. v. Joseph, 105 So. 639 (Miss. 1925)).

[115] *Id.*

[116] *Id.* at 116.

[117] *Id.*

[118] *Id.* (quoting E. Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002)).

[119] *Id.* (quoting *E. Ford, Inc.*, 826 So. 2d at 716).

[120] *Id.*

[121] *Id.* (citing parties' arbitration contract).

fifteen days and the plaintiff had a total of nineteen days before he underwent surgery.[122]

In *East Ford, Inc. v. Taylor*, however, the Mississippi Supreme Court held the arbitration agreement at issue was procedurally unconscionable because the arbitration clause was one-third the size of most of the rest of the contract, the arbitration clause was in very fine print, some details in the contract were in bold lettering but the arbitration clause was not, and the arbitration clause was preprinted on the contract.[123]

In *MS Credit Center, Inc. v. Horton*, the plaintiffs asserted procedural unconscionability, specifically, that the plaintiff "did not knowingly and voluntarily agree to the terms of the arbitration agreement."[124] The court went through the *East Ford, Inc.* six factor test in considering whether the arbitration provisions were procedurally unconscionable.[125] The facts the court considers are as follows: "1) lack of knowledge; 2) lack of voluntariness; 3) inconspicuous print; 4) complex legalistic language; 5) disparity in sophistication or bargaining power; 6) lack of opportunity to study the contract and inquire about the contract terms."[126] As to the plaintiff's lack of knowledge and understanding about the arbitration agreement, the court pointed out that parties to a contract in Mississippi have a duty to read all the terms of a contract which they sign.[127] Additionally, the court noted it has never held that one party to

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[122] *Id.*

[123] 826 So. 2d at 716-17.

[124] 926 So. 2d 167, 176 (Miss. 2006) (citing *E. Ford, Inc.*, 826 So. 2d at 716). Plaintiffs' contention of procedural unconscionability is based on four claims:

> (1) she did not have knowledge of the arbitration agreement; (2) the arbitration provision was not explained to her or otherwise brought to her attention; (3) she did not voluntarily agree to the arbitration agreement, as it was a contract of adhesion; and (4) the arbitration agreement was not understandable and could not be explained by MS Credit's employee.

Id.

[125] *Id.* at 177-79.

[126] *Id.* at 177.

[127] *Id.* (citing Titan Indem. Co. v. City of Brandon, 27 F. Supp. 2d 693, 697 (S.D. Miss. 1997)).

a contract has "an inherent duty" to explain a contract's terms to the other party.[128] As to the lack of voluntariness factor, the court held that a defendant employee testified that the arbitration agreement was negotiable and plaintiff failed to testify to the contrary.[129] Also, the court noted that because the arbitration agreement was specifically separated from the rest of the document, it could have been excluded from the loan transaction.[130] Lastly, the court noted there was no evidence to suggest the plaintiff requested to negotiate the terms of the loan transaction or requested that the arbitration agreement be amended.[131]

Further, the record showed the arbitration agreement was on a separate page of paper and was in the same font as the rest of the document, and the title of the arbitration agreement was printed in all bold, capital letters.[132] As to the factor regarding "complex legalistic language," there was no authority to support an argument that a contract should be unenforceable merely because a lay person may have difficulty understanding its provisions.[133] The agreement also made clear to the plaintiff she was "'waiving any right to a trial by a judge or by a judge and jury.'"[134] As to the plaintiff's contention of disparity in sophistication or bargaining power, the court cited plaintiff's failure to support this argument by any sworn testimony, affidavits or other evidence.[135] Additionally, the court noted the plaintiff provided no evidence to suggest she was prevented from studying and inquiring about the terms of the agreement or was rushed and hurried into reading and signing the agreement.[136] In summary, the court stated, "This Court

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[128] *Id.* The court further explained that such a duty would arise only "in fiduciary or confidential relationships." *Id.* (citing Van Zandt v. Van Zandt, 86 So. 2d 466 (Miss. 1956)).

[129] *Id.* at 178.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* (quoting parties' arbitration contract).

[135] *Id.* at 179.

[136] *Id.*

could hardly employ a rule which required the parties to every contract to be of exactly equal sophistication."[137]

In another case, the court held affidavits by borrower-plaintiffs indicating an inability to get a loan anywhere without signing an arbitration agreement were insufficient without other evidence to prove procedural unconscionability.[138] The court specifically pointed to a lack of evidence showing that "any borrower even balked at the idea of signing the arbitration agreement" or "that the borrowers could not get a competitive loan from another company or even that they could not do without the loan."[139]

b. Substantive Unconscionability

An arbitration agreement is said to be substantively unconscionable when its terms are shown to be oppressive.[140] The court in *MS Credit Center, Inc. v. Horton* noted that arbitration agreements are substantively unconscionable if the agreements are:

> "one-sided [and] one party is deprived of all the benefits of the agreement or left without a remedy for [the other] party's nonperformance or breach, a large disparity between cost and price or a price far in excess of that prevailing in the market price [exists], or [the] terms bear no reasonable relationship to business risks assumed by the parties."[141]

The court in *Horton* held the plaintiff's substantive unconscionability argument was unmeritorious because the arbitration agreement between the defendants and the plaintiff contained "no limitation of damages, no limitation on bringing claims, and no waiver of liability."[142] In fact, the only thing the arbi-

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[137] *Id.*

[138] Norwest Fin. Miss., Inc, v. McDonald, 905 So. 2d 1187, 1194 (Miss. 2005).

[139] *Id.* at 1194-95.

[140] Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert, No. 2005-CA-02223-COA, 2006 WL 3593437, at *4 (Miss. Ct. App. Dec. 12, 2006).

[141] 926 So. 2d 167, 177 (Miss. 2006) (quoting Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 110 (S.D. Miss. 1979)).

[142] *Id.* at 179.

tration agreement did was "submit[] the question of liability to a forum other than the courts."[143]

The court in *Vicksburg Partners, L.P. v. Stephens* stated, "[In] reviewing a contract for substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties."[144]

Though the court held the arbitration agreement was conscionable in *Vicksburg Partners, L.P.*, the court found the limitation of liability sections to be substantively unconscionable and unenforceable because the weaker party was limited to a $50,000 recovery whereas the other party's recovery was not limited whatsoever.[145] The court has made clear that if part of an arbitration provision is found to be void and unconscionable, the remainder of the agreement may still be binding against the parties.[146]

"Grievance resolution" provisions allowing a nursing home or other facility to bring payment-related grievances in court but prohibits a resident from bringing a suit in court for any reason whatsoever have been held to be substantively unconscionable.[147] Additionally, terms of an arbitration agreement requiring the resident to pay "all costs for enforcement of the

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[143] *Id.*

[144] 911 So. 2d 507, 521-22 ("While unconscionably oppressive terms can be facially invalid, a per se finding of substantive unconscionability is strictly applicable only to a provision that by its very language significantly alters the legal rights of the parties involved and severely abridges the damages which they may obtain."). *See generally* Covenant Health & Rehab. of Picayune, LP v. Brown, 949 So. 2d 732 (Miss. 2007) (acknowledging applicability of court's holding regarding substantive unconscionability in *Vicksburg Partners, LP* to arbitration agreement in issue).

[145] *Vicksburg Partners, L.P.*, 911 So. 2d at 523. The exact same provisions were most recently held unconscionable by the court in *Brown*. 949 So. 2d 732. Additionally, a waiver of punitive damages by both parties was held to be unconscionable in that the nursing home could unjustly benefit from the provision whereas the resident would be deprived of his right to seek punitive damages. *Id.*

[146] *Id.* (citing Russell v. Performance Toyota, Inc. 826 So. 719, 724-25 (Miss. 2002)).

[147] *Id.* (citing Pitts v. Watkins, 905 So. 2d 533, 555-56 (Miss. 2005)).

agreement if the resident avoids or challenges either the grievance resolution process or an award therefrom" have been held substantively unconscionable because they unreasonably favor defendants and are one-sided and oppressive in nature.[148]

In *Cleveland v. Mann*, the plaintiffs also argued the arbitration agreement was substantively unconscionable because the defendants had sole choice over the arbitration association and because appeal was allowed for the plaintiff only in limited circumstances.[149] The court held that the plaintiff's contentions as to substantive unconscionability were without merit.[150] The court noted that the plaintiff put his initials next to the terms of the agreement stating the arbitration would be performed by a particular association of neutral arbitrators who did not work for the physician or for the patient.[151] The court held the plaintiff had a fair opportunity and a proper forum to dispute his claims, that his legal rights were not limited, that the defendant's liablity was not limited, that the plaintiff's damages were not limited, and that the agreement provided for a neutral arbitration association to provide a neutral arbitrator.[152] Ultimately, the court held "the agreement [at issue was] neither procedurally nor substantively unconscionable" and overturned the trial court's denial of the defendants' motion to compel arbitration.[153]

In *Pitts v. Watkins*, the Mississippi Supreme Court found an arbitration clause in a home inspection agreement substantively unconscionable where one party was allowed to pursue his claims in a court of law and the other party was required to arbitrate his claims.[154] The court also noted that a limitation of liability clause and the creation of a private one-year limitations period in the agreement provided even more evidence of

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[148] *Id.*
[149] 942 So. 2d 108, 116 (Miss. 2006).
[150] *Id.* at 116-17.
[151] *Id.* at 117.
[152] *Id.*
[153] *Id.*
[154] 905 So. 2d 553, 555 (Miss. 2005).

substantive unconscionability.[155]

The court in *Brown* also held that "a contractually created time limitation on suits" will not be enforceable.[156] The court, however, did not find a provision waiving both parties' rights to a jury trial to be unconscionable because it is effectively the same as an arbitration provision.[157]

2. Lack of Consideration

The contract defense of lack of consideration has only been discussed in one recent Mississippi case, which was subsequently overturned by the Mississippi Supreme Court stating that the issue of lack of consideration was not an issue raised by the parties on appeal.[158] The Mississippi Supreme Court did not hold that the Court of Appeals' reasoning regarding the applicability of the defense of lack of consideration to be in error, but rather did not specifically address the issue at all.[159]

In *Fradella v. Seaberry*, the Mississippi Court of Appeals held that the arbitration contract in question was unenforceable and void on its face because it was not supported by consideration.[160] In *Fradella*, a contract for the sale and purchase of real estate was entered into between the purchasers, the Seaberrys, and the sellers, the Germanys.[161] After closing, the Seaberrys discovered discrepancies regarding their home and land purchase and initiated a lawsuit against the Germanys,

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[155] *Id.* at 557-58.

[156] Covenant Health & Rehab. of Picayune, LP v. Brown, 949 So. 2d 732 (Miss. 2007).

[157] *Id.*

[158] Fradella v. Seaberry, No. 2005-CA-00404-COA, 2006 WL 924037 (Miss. Ct. App. Apr. 11, 2006), *rev'd*, No. 2005-CT-00404-SCT, 2007 WL 852097 (Miss. Mar. 22, 2007).

[159] *Fradella*, No. 2005-CT-00404-SCT, 2007 WL 852097 (Miss. Mar. 22, 2007).

[160] 2006 WL 924037, at *3. The Mississippi Supreme Court has held that so long as there is consideration, mutuality of obligation is not required for an arbitration agreement to be enforceable in Mississippi. *See* McKenzie Check Advance of Miss., LLC v. Hardy, 866 So. 2d 446, 453 (Miss. 2004).

[161] 2006 WL 924037, at *1.

the real estate agency, and the real estate company.[162] Based on the contract between the Seaberrys and the Germanys, the real estate agent and the real estate company filed a motion to compel arbitration in the trial court.[163] In analyzing this case, the appellate court stated that in Mississippi there must be a "'meeting of the minds'" as to "the essential elements of the contract in order for it to be enforceable."[164] Additionally, the court noted that offer, acceptance, and consideration must be present in order for a contract to be enforceable.[165] The court held that both the Seaberrys and the Germanys indicated an individual willingness to enter into arbitration agreements with the real estate agent and the real estate company when it initialed the contract terms.[166] However, the court noted that neither the real estate agent nor the real estate company gave any consideration to the Seaberrys or the Germanys for the arbitration agreements; therefore, since there was no consideration, the arbitration contract was held to be void.[167]

3. Enforcement by and Against Non-signatories to the Contract

An issue which has arisen in several arbitration-related cases is whether non-signatories or non-parties may be bound to an arbitration agreement and, conversely, whether they may attempt to enforce an arbitration agreement. Though technically this issue arguably falls under the first prong of the test regarding scope, which has previously been discussed, the courts have dealt with this issue by applying state contract law principles.

The appellate courts of Mississippi have held that "[a]rbitration agreements are enforceable as to non-signatories to a contract when the non-signatory party is a third-party

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[162] *Id.*

[163] *Id.*

[164] *Id.* at *2 (citing Hunt v. Davis, 45 So. 2d 350, 352 (Miss. 1950)).

[165] *Id.* (citing Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023, 1029 (Miss. 2000)).

[166] *Id.* at *3.

[167] *Id.*

beneficiary."[168] In *Terminix International, Inc. v. Rice*, the Mississippi Supreme Court adopted an earlier Fifth Circuit holding when it stated, "[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency."[169] The court further quoted the Fifth Circuit holding:

> In the arbitration context . . . a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [one] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.[170]

The court adopted the Fifth Circuit's principles in *Bailey* and held that Mrs. Rice was bound to the arbitration clause signed by her husband.[171]

Arbitration agreements have not been held to be invalidated upon "the death of the signatory and may be binding on successors and heirs if provided in the agreement."[172] In *Brown*, the arbitration provision was held to be enforceable by and against the decedent's administrators and the nursing home.[173] In *Adams v. Greenpoint Credit, LLC*, the court noted that the plain language of the arbitration provision did not indicate "a clear intent" by the parties to the contract to make

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[168] Holman Dealerships, Inc. v. Davis, 934 So. 2d 356, 359 (Miss. Ct. App. 2006); *see also* Adams v. Greenpoint Credit, LLC, 943 So. 2d 703, 708 (Miss. 2006) ("[A]rbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary."); Smith Barney, Inc. v. Henry, 775 So. 2d 722, 727 (Miss. 2001).

[169] 904 So. 2d 1051, 1058 (Miss. 2004) (quoting Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 266 (5th Cir. 2004)).

[170] *Id.* (quoting *Bailey*, 364 F.3d at 266).

[171] *Id.*

[172] Covenant Health & Rehab. of Picayune, LP v. Brown, 949 So. 2d 732 (Miss. 2007) (citing Cleveland v. Mann, 942 So. 2d 108, 118 (Miss. 2006)).

[173] *Id.*

Beth Brown, a plaintiff, a third-party beneficiary.[174] The court noted that Ms. Brown did not sign the contract, was not alluded to in the contract, and was not a beneficiary of the contract.[175] Because Ms. Brown is a non-signatory, non-third-party beneficiary, she "is effectively a stranger to the contract" and "is not bound by the arbitration provision."[176]

The Mississippi Supreme Court has also decided the issue of whether an arbitration agreement is binding on wrongful death beneficiaries.[177] The wrongful death beneficiary plaintiffs in *Mann* contended they did not sign the arbitration agreement and it was not signed by anyone with authority to sign on their behalf.[178] Nevertheless, the plain language of the agreement stated that it applied to disputes between "'Patient . . . or the heirs-at-law or personal representative of Patient, as the case may be, and the Clinic, PLLC and each physician individually.'"[179] The court stated it is "'clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.'"[180] Additionally, the court reiterated one of its previous holdings that "[t]he death of a party to an agreement to arbitrate future disputes does not invalidate the agreement."[181] If the arbitration agreement evinces an intent between the parties for such disputes to be resolved via arbitration, the intent of the parties must be respected by the court.[182] Because the Mississippi

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[174] 943 So. 2d at 709.

[175] *Id.*

[176] *Id.* The court also failed to consider the "extraordinary remedy" of equitable estoppel. *Id.* (quoting B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 482, 491 (Miss. 2005)); *see also* EEOC v. Waffle House, Inc., 543 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

[177] Cleveland v. Mann, 942 So. 2d 108, 117 (Miss. 2006).

[178] *Id.*

[179] *Id.* at 117-18 (quoting parties' arbitration contract).

[180] *Id.* at 118 (quoting Terminix Inter'l, Inc. v. Rice, 904 So. 2d 1051, 1058 (Miss. 2004)); *see also* Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 266 (5th Cir. 2004).

[181] *Id.* (alteration in original) (quoting Smith Barney, Inc. v. Henry, 775 So. 2d 722, 726 (Miss. 2001)).

[182] *Id.*

wrongful death statute[183] only allows wrongful death beneficiaries to bring claims a decedent could have brought had the decedent survived, the court held the converse must also be true and wrongful death beneficiaries "may NOT bring claims the decedent could not have brought had the decedent survived."[184] Because a wrongful death beneficiary may not bring a claim a decedent could not have brought himself, an arbitration agreement binding on a decedent is also binding on his wrongful death beneficiaries.[185]

Most recently, the Mississippi Supreme Court in *Fradella* held that an arbitration clause in a contract for the sale and purchase of real estate entered into between the buyer and seller was also applicable to the real estate agency and the real estate agent representing both parties in a dual capacity.[186] Though the contract was not signed by the real estate agent or agency, the court held the contract "clearly created rights and responsibilities" applicable to the agent and agency.[187] As a result, the court held it was of no consequence that the contract was not signed by someone on behalf of the real estate agency.[188]

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[183] Miss. Code Ann. § 11-7-13 (2004 & Supp. 2006).

[184] *Mann*, 942 So. 2d at 118.

[185] *Id.* The court noted that the same reasoning was applied in *Jenkins v. Pensacola Health Trust,* 933 So. 2d 923 (Miss. 2006). The *Jenkins* court held that wrongful death beneficiaries were barred from bringing a wrongful death claim where the statute of limitations had expired against the decedent. 933 So. 2d at 926. The *Mann* majority cited several other jurisdictions to support their holding. *See, e.g.*, Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 664 (Ala. 2004); Herbert v. Superior Court, 215 Cal. Rptr. 477 (Cal. Ct. App. 1985); Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003).

[186] *Fradella*, No. 2005-CT-00404-SCT, 2007 WL 852097, at *9 (Miss. Mar. 22, 2007).

[187] *Id.*

[188] *Id.* (holding that *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), was not applicable to this real estate transaction, which was the principal case that the trial court relied on in denying arbitration for the defendant).

4. Waiver

The Mississippi Supreme Court has stated, "A party seeking to invoke arbitration may waive that right if it actively participates in litigation."[189] The court also pointed out, however, that "[w]aiver of arbitration is not a favored finding, and there is a presumption against it."[190] The court further opined, "We have expressed our intention to uphold arbitration agreements if at all possible under the circumstances."[191] Put another way, the court has stated that "'[a] party alleging waiver of arbitration must carry a heavy burden.'"[192] The court has also pointed out that the legislative intent behind the Federal Arbitration Act was "'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'"[193]

In *University Nursing Associates, PLLC v. Phillips*, the court held generally that a defendant who merely files an answer and a motion to dismiss does not waive his or her right to invoke arbitration.[194] The court cited a Fifth Circuit decision holding, "[a] defendant did not waive arbitration, prior to moving for a stay, by filing an answer, interrogatories and a request for production of documents, moving for a protective order, and agreeing to a joint motion for continuance requesting an extension of the discovery period."[195] The *Phillips* court held that the plaintiff was not prejudiced by delay because the

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[189] Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270, 1276 (Miss. 2003) (citing Cox v. Howard, Weil, Labouisse, Freidrichs, Inc., 619 So. 2d 908, 914 (Miss. 1993)).

[190] *Id.* (citing Steel Warehouse Co. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234, 238 (5th Cir. 1998)); *see also* MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 179 (Miss. 2006); Russell v. Performance Toyota, Inc., 826 So. 2d 719, 724 (Miss. 2002) ("[W]aiver of arbitration is not a favored finding.") (quoting Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.3d 494, 497 (5th Cir. 1986)).

[191] *Phillips*, 842 So. 2d at 1276.

[192] Doleac v. Real Estate Prof'ls, Inc., 911 So. 2d 496, 505 (Miss. 2005) (quoting Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999)).

[193] *Phillips*, 842 So. 2d at 1277 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983)).

[194] *Phillips*, 842 So. 2d at 1276.

[195] *Id.* at 1277 (citing Tenneco Resins, Inc. v. Davy Int'l, AG, 770 F.2d 416, 420 (5th Cir. 1985)).

defendant asserted arbitration as an affirmative defense in its answer less than two months after the plaintiff filed her petition for accounting, and a hearing regarding arbitration was held four months later.[196] Despite not finding that waiver occurred in the *Phillips* case, the court issued this admonition: "As a practice note, parties desiring to seek arbitration should promptly file and present to the trial court a motion to stay proceedings and a motion to compel arbitration."[197]

The Mississippi Supreme Court, in *Pass Termite & Pest Control, Inc. v. Walker*, stated that "'service of an answer in an action on the contract does not constitute waiver of the right to arbitration, even though the answer does not set up the arbitration clauses as a defense.'"[198] However, the court held in *Walker* that the defendant's actions of requesting a jury trial in its answer coupled with the invocation of the discovery process indicated an intent to forgo arbitration.[199]

In *Sanderson Farms, Inc. v. Gatlin*, the court held waiver may be express or implied and may be inferred by the conduct of the parties.[200] Additionally, the court held a party may waive its right to arbitration by its refusal to pay fees and costs which are a part of the arbitration agreement because such a refusal is "inconsistent with the right to arbitrate."[201]

In *Horton*, the court pointed out that arbitration can in fact be waived where a party "'actively participates in a lawsuit or takes other action inconsistent with the right to arbitra-

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[196] *Id.* at 1278. *Compare* Walker v. J.C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991) (holding a thirteen month delay did not constitute waiver), *with* Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986) (holding aseventeen month delay did constitute waiver).

[197] *Phillips*, 842 So. 2d at 1277; *see also* In re Tyco Int'l (US), Inc., 917 So. 2d 773, 780 (Miss. 2005) (holding Tyco defendants' active participation in numerous actions inconsistent with seeking arbitration for more than three years constituted an excessive delay and a waiver of their right to arbitration).

[198] 904 So. 2d 1030, 1034-35 (Miss. 2004) (quoting *Phillips*, 842 So. 2d at 1276).

[199] *Id.* at 1035.

[200] 848 So. 2d 828, 837 (Miss. 2003).

[201] *Id.* at 838. Specifically, the court held the entire arbitration agreement should be stricken for defendant's failure to pay fees in contravention of contractual agreement. *Id.*

tion.'"[202] Furthermore, the court noted that arbitration may be waived if the judicial process has been so substantially invoked that the other party has suffered detriment or prejudice.[203] The court also noted that it had found waiver of arbitration only in limited circumstances.[204] In one case, the party requesting that arbitration be compelled had already filed "a 'summary judgment motion, requested two continuances, appealed to [the] court based on a pre-trial ruling, and had requested various types of discovery.'"[205] As a result, the court found that the right to arbitration was waived due to "'extensive' pre-trial litigation."[206] In another case, arbitration was waived where the defendant refused pay one-half of the arbitration costs.[207] In a third case, the court held that arbitration had been waived where the movant did not seek to compel arbitration for 237 days after the filing of the complaint, failed to raise arbitration as an affirmative defense in the answer, requested a trial by jury in the answer, and undertook discovery prior to seeking to compel arbitration.[208] In *Horton,* the defendants asserted arbitration as an affirmative defense in their answers; however, the defendants engaged in pre-trial litigation by "consenting to a scheduling order, engaging in written discovery, and conducting [the plaintiff's] deposition."[209] The court noted that although participation toward litigation is an important factor, more is needed to constitute waiver of the right to compel arbitration.[210] The court specifically pointed out that typically a party's delay in pursuing its

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[202] MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 179 (Miss. 2006) (quoting Cox v. Howard, Weil, Labouisse, Friederichs, Inc., 619 So. 2d 908, 913-14 (Miss. 1993)); *see also In re Tyco Inter'l (US), Inc.*, 917 So. 2d at 779.

[203] *Horton*, 926 So. 2d at 179 (quoting *Phillips,* 842 So. 2d at 1278).

[204] *Id.* at 179.

[205] *Id.* at 179-80 (quoting *Cox*, 619 So. 2d at 914).

[206] *Id.* at 179 (quoting *Cox*, 619 So. 2d at 914).

[207] *Id.* at 180 (citing Sanderson Farms v. Gatlin, 848 So. 2d 828, 838 (Miss. 2003)).

[208] *Id.* (citing Pass Termite & Pest Control v. Walker, 904 So. 2d 1030, 1035 (Miss. 2004)).

[209] *Id.*

[210] *Id.*

right to compel arbitration and a party's participation in the judicial process are simply not enough to constitute waiver standing alone.[211] Nevertheless, the court held that the defendant in *Horton* waived its right to compel arbitration as there was "a substantial and unreasonable delay in pursing the right, coupled with active participation in the litigation process."[212]

The Mississippi Supreme Court in *Phillips* cited cases by the Fifth Circuit as to what amount of delay in time in demanding arbitration constituted a waiver of one's right to arbitrate. The Fifth Circuit has noted that a delay of only thirteen months *does not* constitute a waiver of the right to arbitrate.[213] However, the Fifth Circuit has noted that a delay of seventeen months *does* constitute a waiver of the right to arbitrate.[214] The *Doleac* court held that "taking possession of the collateral [or self-help] or other similar actions do not waive a party's right to arbitration."[215]

In *Rice*, the defendant was held to have not waived its right to arbitration in a case where the plaintiffs alleged that the defendants "demonstrated a 'disinclination to arbitrate'" by participating in discovery after its motion to compel arbitration was denied by the trial court.[216] The court stated that the defendant had no choice but to go forward and participate in discovery after its motion to compel arbitration was denied.[217] The court also held that merely because the defendant attempting to compel arbitration agreed to the scheduling order entered by the trial court did not mean the defendant was sub-

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[211] *Id.*

[212] *Id.*

[213] Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270, 1278 (Miss. 2003) (citing Walker v. J.C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991)).

[214] *Id.* (citing Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1160-62 (5th Cir. 1986)).

[215] Doleac v. Real Estate Prof'ls, Inc., 911 So. 2d 496, 505 (Miss. 2005); *see also* Russell v. Performance Toyota, Inc., 826 So. 2d 719, 724 (Miss. 2002) (holding that a defendant's repossession of a defaulting consumer's car does not result in a waiver of arbitration, as the judicial process has not even been invoked).

[216] Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1057 (Miss. 2004).

[217] *Id.*

mitting to a jury trial and waiving its right to arbitration.[218]

V. CONCLUSION

Arbitration is a relative newcomer to the jurisprudence of the state of Mississippi. The Mississippi high court did not fully recognize the right to pre-dispute arbitration agreements until 1998. Since that time, case law regarding arbitration has gradually increased as more arbitration agreements have been drafted and attempted to be enforced. Today, opinions regarding the scope, arbitrability and enforceability of arbitration agreements can be found in almost every hand down list coming from the Mississippi appellate courts. Attorneys from every end of the state are confronted with drafting arbitration agreements, explaining arbitration to clients, attempting to enforce arbitration agreements, arguing that certain arbitration agreements are unenforceable, and serving as the arbitrator of disputes. As arbitration agreements become even more ubiquitous in daily consumer transactions and service-provider contracts, the courts will increasingly confront issues involving arbitration agreements. As a result, the courts will continue to grapple with many of the same issues discussed herein and will likely encounter a myriad of other potential challenges to and arguments for supporting enforcement of arbitration agreements. In conclusion, arbitration is a pertinent and ever-evolving reality in our legal system and in our society which will no doubt provide a litany of further case law in Mississippi and continue to have far-reaching effects on virtually all of Mississippi's citizens.

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[218] *Id.*

COMMENTS

LOOKING FOR COMITY IN THE HABEAS CORPUS WORLD: THE SUSPENSION CLAUSE IN RELATION TO THE AEDPA AS AMENDED BY THE USA PATRIOT ACT

Kathryn E. Wetherbee[*]

"Proponents of the death penalty seem to regard federal habeas corpus as no more than a delaying tactic."[1]

I. INTRODUCTION

The debate surrounding habeas corpus is no less contentious than that of capital punishment, even though the debate may be a little more scholarly; the debate rages between those wishing to maintain or expand federal habeas protections and those seeking to restrict it, raising issues of federalism, finality, and efficiency.[2] Although the debate surrounding habeas

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[1] Larry W. Yackle, *The American Bar Association and Federal Habeas Corpus*, 61 LAW & CONTEMP. PROBS. 171, 191 (1998).

[2] Roger A. Hanson & Henry W. K. Daley, U.S. DEP'T OF JUSTICE FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS iv (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf.

rarely subsides,[3] the tide of opinion disfavoring federal habeas corpus is growing and this opinion was affected by both the Oklahoma City bombing and the events of September 11th.[4] Following both these incidents, Congress enacted high-profile, wide-ranging legislation; following the Oklahoma City Bombing, Congress enacted the Antiterrorism and Effective Death Penalty Act[5] (AEDPA) and following the attacks on September 11th, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act[6] (USA PATRIOT Act). Although the AEDPA was passed to address "domestic terrorism,"[7] it provides states, when certain specifications are met, a variety of specific procedural advantages, including the ability to implement new statutes of limitations on federal applications for habeas corpus relief for state capital convictions;[8] if the specifications are met, the statute of limitations for application for federal habeas corpus relief is 180 days "after the final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review."[9] The Patriot Act, originally enacted in response to September 11th, did not specifically address habeas corpus provisions. The Act, however, was recently renewed, and in its provisions was an amendment to the AEDPA changing who decides when

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[3] Karen M. Marshall, Note, *Finding Time For Federal Habeas Corpus*, 37 AKRON L. REV 549, 553 (2004) (quoting Senator Biden as saying, "[Habeas Corpus] has been the issue of debate . . . at least for the seventeen years that I have been a senator," 135 CONG. REC. S13472 (daily ed. Oct 16, 1989)).

[4] Alexander Rundlet, Comment, *Opting for Death*, 1 U. PA. J. CONT. L. 661, 702 (1999) (commenting that the urge to respond legislatively to terrorism pushed habeas reform through Congress which had otherwise failed).

[5] 28 U.S.C. §§ 2244-2266 (2000), *as amended by* Pub. L. No. 109-77, 120 Stat. 250 (2006). This paper will focus on Special Habeas Corpus Procedures in Capital Cases, 28 U.S.C. §§ 2261, 2263.

[6] Pub. L. No. 107-56, 115 Stat. 272 (2001) (amended 2006) (codified in titles 8, 15, 18, 22, 31, 42, 49, and 50 of the United States Code).

[7] Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB & CONTEMP. L. 399, 409 (1997).

[8] *See* 28 U.S.C. §§ 2261, 2263.

[9] *See id.* § 2263.

a state has met specifications sufficient to abridge the federal habeas statute of limitation for state crimes.[10]

To this point, no state has been able to utilize the provisions reducing the time period enumerated in the AEDPA;[11] however, the amendment made to it by the Patriot Act may now make it easier for states to utilize the AEDPA provisions and shorten the federal habeas time line for state convictions. This paper asserts that creating and filing habeas petitions within in this abridged statute of limitation—while managing concurrent state post conviction relief process, and taking into account the time and energy involved in the creation of a habeas petition, along with any "catch-up" required for a newly appointed counsel to a petitioner's case—constitutes an effective suppression of the writ of habeas corpus in violation of the United States Constitution.[12]

Section two of this paper briefly explores both the history and debate surrounding the "great" writ; additionally, section three discusses how and when habeas corpus has and can be suppressed. Section four delves into the impetus, law, and problems associated with the AEDPA. Exploring how and why the Patriot Act was written to amend the AEDPA, the potential effects of the new power under the AEDPA, as well as the possible constitutional implications of it, are discussed in section five; finally, section six concludes with a summary and raises other possible questions to the newly amended Act.

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[10] Pub. L. No. 107-56, 115 Stat. 272 (2001) (amended 2006).

[11] John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 274 (2006).

[12] "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art I, § 9, cl. 2.

II. The "Great Writ", a Long History and a Little Reform, Briefly Explored

A. Long History Briefly Stated

"The privilege of the writ of habeas corpus is the right of the citizen to be discharged from imprisonment unless legal cause can be shown for his detention."[13] Habeas corpus literally means: "you have the body."[14] Although it was originally used by those who had an objection to go before the court, today the meaning of the term has come to resemble the phrase, "habeas corpus *ad subjiciendum*," which is a writ directed at an individual detaining another and demanding that they "produce the body."[15] The writ is rooted in our English legal tradition and was reflected at the Constitutional Convention where Charles Pinckney first proposed that the writ be included in the constitution.[16] A subsequent debate ensued as to whether there should be a suspension clause; some delegates, intimately familiar with notorious deprivation of rights by the English, suggested that no such clause was needed because there would never be a reason for the new government to suppress the writ.[17] The disputes led to several motions, which ranged from limiting the amount of time period for which the writ could be suppressed, to those desiring to leave the discretion with judges.[18] Eventually, after some stylistic changes, the suppression clause was adopted as it is known today,[19] over the objection of those who, again, believed that no suppression of the writ was ever appropriate

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[13] In re Dugan, 6 D.C. 139 (1865).

[14] Black's Law Dictionary 837 (4th ed. 1968).

[15] *Id.*

[16] Marshall, *supra* note 3, at 556 (citing William F. Duker, A Constitutional History of Habeas Corpus, *in* 13 Contributions in Legal Studies, 3-179 (Paul L. Murphy ed.,1980)).

[17] Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners In the Judiciary Act of 1789*, 51 Ala. L. Rev. 531, 544 (2000).

[18] Freedman, *supra* note 17, at 544.

[19] *Id.* at 546.

for fear that President Washington would become, again, King George.[20]

Eventually, the Judiciary Act of 1789 granted power to the federal judiciary to grant habeas relief; however, the Supreme Court in *Ex Parte Bollman,*[21] read the Judiciary Act of 1789 as not encompassing a state prisoner's right to challenge his confinement under federal habeas corpus rights.[22] It is argued, however, that the basis for believing that the suppression clause is inapplicable to state prisoners, as a matter of law under the Judiciary Act of 1789 or as a matter of federalism under the Constitution, is incorrect;[23] furthermore, it is argued that because there was consensus on both the presence of the suppression clause and the wording of the clause that the framers of the clause intended to "limit [c]ongressional interference with the power that federal and state courts were each assumed to possess: to order the release on habeas corpus both federal and state prisoners."[24] Regardless of whether the assumption underlying the decision in *Ex Parte Bollman* was correct, the Habeas Corpus Act of 1867[25] granted a state convict the right to contest his conviction and receive habeas review in a federal court;[26] this action, taken in response to congressional distrust of the states after the Civil War and Reconstruction, grants defendants access to the federal courts for habeas review of claims that they are held "in violation of the Constitution or any treaty or law of the United States."[27]

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[20] Marshall, *supra* note 3, 558 at n.37 (citing Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism after the Anti-terrorism* [sic] *and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 339 n.37 (1997)).

[21] 8 U.S. 75 (1807)

[22] Freedman, *supra* note 17, at 536.

[23] *Id.*

[24] *Id.* at 542.

[25] An Act of February 5, 1867, ch. 28, 14 Stat. 385.

[26] Aaron G. McCollough, Note, *For Who the Court Tolls: Equitable Tolling of the AEDPA Statue of Limitations in Capital Habeas Cases*, 62 WASH & LEE L. REV. 365, 370-71 (2005)

[27] Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L &

B. The Reform Era

The first "era" of reform arguably came during the Warren court,[28] dating from 1953-1969, which augmented the scope of habeas review and further expanded federal protection under the same.[29] Two decisions "embody the Warren court" expansion and broadening of federal habeas:[30] *Brown v. Allen*[31] and *Fay v. Noia*,[32] eventually led to both judicial and legislative efforts to narrow the scope of federal protection and habeas review.[33] Ironically, it wasn't Congress who was able to "muster" the reforms, but the "disdain" of a Supreme Court Justice who led the reforms, but who as a Supreme Court law clerk was forced to endure these "intrusions" into state criminal convictions.[34] The Court, in *Brown,* greatly expanded its prerogative to determine the level of deference given to state court decisions and is "rooted" in the idea that federal courts can re-litigate a conviction under the guise of federal habeas corpus proceedings.[35] Additionally, *Fay* provided an exception to the procedural default rule.[36] Traditionally, those issues that were not brought up on direct appeal or on state post-conviction relief, were procedurally barred from habeas review in federal courts; *Fay*, however, explained that petitioners were subject to the procedural default rule only if they "deliberately bypassed" state procedure or "sandbagged" as it is better known.[37] Two additional cases garnered disdain in the above-mentioned law clerk[38]—*Townsend v.*

CRIMINOLOGY 467, 474 (2000) (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867)).

[28] *Id.*

[29] *Id.* at 475.

[30] *Id.* (identifying *Brown* and *Fay* as milestone cases in the Warren Court).

[31] 344 U.S. 443 (1953).

[32] 372 U.S. 391 (1963).

[33] Blume, *supra* note 11, at 265.

[34] *Id.* Can you name this one time Supreme Court law clerk turned Chief Justice? *See* Blume, *supra,* note 11.

[35] Kappler, *supra* note 27, at 475.

[36] *Id.*

[37] *Id.*

[38] Blume, *supra* note 11, at 265 (identifying four cases indicative of the War-

Sain[39] and *Sanders v. United States*.[40] This "high-water mark" of the Warren Court drew academic, legislative and judicial criticism and lead the next era of habeas revolution.[41]

C. The Reform Era, II

With the close of the Warren Court came a nearly abrupt end to the expanding realm of federal habeas.[42] Just as broadly as the cases of the Warren Court had made the scope of habeas, subsequent cases in the Burger and Rehnquist Courts restricted the scope of federal habeas corpus review of state court decisions.[43] The Burger/Rehnquist Courts made no secret of their aim to curb habeas review of state convictions;[44] the Courts explained that they were curing a social ill and trying to alleviate the significant drain on "scarce judicial resources" caused by such an expansive habeas review.[45] This new period of "reform" provided an onslaught of notable cases;[46] *Wainwright v. Sykes*,[47] which overruled *Fay*, reinstituted the procedural default rule and tough exceptions thereto; *McCleskey v. Zant*[48] curtailed federal court recognition of successive petitions; *Keeney v. Tamayo-Reyes*[49] restricted the use of evidentiary hearings in habeas proceedings by federal courts; and, *Duncan v. Henry*[50] held that in order

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ren Court's approach).

[39] 372 U.S. 293 (1963) (showing little deference to trial judges and authorized evidentiary hearings in federal habeas proceedings where there was no explicit finding by the trial judge and where there had not been an evidentiary hearing in state post conviction relief).

[40] 373 U.S. 1 (1963) (allowing successive filing of federal writs).

[41] Blume, *supra* note 11, at 265. (noting Chief Justice Rehnquist's disdain for the Warren Court's expansion of habeas review).

[42] Kappler, *supra* note 27, at 476.

[43] Blume, *supra* note 11, at 265.

[44] *Id.*

[45] *Id.* at 269.

[46] *Id.* at 266-69 (identifying key cases in the Burger and Rehnquist Courts which attempted to curtail the federal habeas scheme).

[47] 433 U.S. 72 (1977).

[48] 499 U.S. 467 (1991).

[49] 504 U.S. 1 (1992).

[50] 513 U.S. 364 (1995).

to preserve a federal claim, the petitioner must exhaust all state remedies. The Court focused on issues central to the very heart of the habeas debate: "comity, federalism, and finality."[51] By the time Congress was able to "muster" the ability to reform the federal habeas process, "muster" engendered solely by the consequences of the actions of Timothy McVeigh, the Court had already extensively recasted federal habeas law.[52]

III. Suspension: How and When

Article one, section 9, clause 2, the "Suspension Clause," gives rise to both the power to grant writs and suspend the issuance of them.[53] If, as mentioned above, it is true that the framers of the constitution believed that the right to issue the writ inhered in the judiciary, and the Suppression Clause was to limit Congress' interference with that power,[54] when is it appropriate to suspend the writ and who may suspend it?

The writ has only ever been officially suspended twice by the federal government.[55] The military, during a war time and in the presence of martial law, has not honored habeas corpus; there were two incidents in which the writ was suspended in United States territories, and in 1905 a Filipino Territorial Governor suspended it.[56] However, upon declaration of martial law, which has been declared on several instances, habeas corpus must be suspended.[57]

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[51] Blume, *supra* note 11, at 269.

[52] Blume, *supra* note 11, at 270; *see also* Kappler, *supra* note 27, at 488 (stating that it was only the bombing of the Murrah building which supplied the political will to reform habeas corpus) (citing H.R. 2703, 104th Cong., 1st Sess. (1995)).

[53] U.S. Const., art. I, § 9, cl. 2; *see also* Marshall, *supra* note 3, at 557.

[54] *See supra* note 22.

[55] Tor Ekeland, Note, *Suspending Habeas Corpus: Article 1, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 Fordham L. Rev. 1475, 1488 (2005).

[56] Ekeland, *supra* note 55, at 1487 (discussing the history of the writ, both in Britain and in the United States and when and how it has been suspended).

[57] Marshall, *supra* note 3, at 558 n.46 (citing Ex Parte Milligan, 71 U.S (2 Wall.) (1866)).

President Lincoln suspended the writ during the civil war.[58] This is believed to be the only time when the writ has been suspended absent an express authority from Congress;[59] however, that declaration, which was later retroactively authorized by Congress in 1861,[60] occurred while Congress was not in session, in response to Confederate sympathizers who were terrorizing Baltimore.[61] The Court later determined, in *Ex Parte Merryman*,[62] that the executive does not have the unilateral power to suspend the writ,[63] despite previous actions by President Lincoln. Chief Justice Taney wrote that "[the President] does not faithfully execute the laws, if he takes it upon himself legislative power, by suspending the writ."[64] The second "official" suspension was pursuant to a Congressional Orde;[65] in October of 1871, President Grant suspended the writ in nine South Carolina counties in an effort to fend off the Ku Klux Klan during Reconstruction.[66]

The history of habeas cases evidences a struggle, when the writ is suspended, between whether it is the actual writ (being released, but retaining judicial review nonetheless) or the judicial review of the unconstitutional detention (jurisdiction), which is suspended.[67] These cases, however, only address who has the power to suspend the writ and what the consequences of that suspension may be; they do not address

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[58] Ekeland, *supra* note 55, at 1487.

[59] Marshall, *supra* note 3, at 557.

[60] Ekeland, *supra* note 55, at 1494.

[61] Ekeland, *supra* note 55, at 1493 (discussing Ex Parte Merryman, 17 F. Cas. 144 (C.C. Md. 1861)).

[62] 17 F. Cas. 144 (C.C.D. Md. 1861).

[63] *Id.*

[64] Ekeland, *supra* note 55, at note 140 (citing Ex Parte Merryman, 17 F. Cas. at 149).

[65] Marshall, *supra* note 3, at note 48 (citing DUKER, *supra* note 16, at 178 n.190).

[66] Ekeland, *supra* note 55, at 1498 n.165 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (Scalia, J., dissenting)). *But see* Marshall, *supra* note 3, at 558 n.48 (citing WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, *in* 13 CONTRIBUTIONS IN LEGAL STUDIES, 178 n.190 (Paul L. Murphy ed., 1980) (stating that it was counties in *North* Carolina (emphasis added))).

[67] Ekeland, *supra* note 55, at 1488.

circumstances in which the suppression of the writ maybe circumstantial, incidental, or not as obvious. Congress has the power to suspend the writ and impose limitations on the remedy but is bound by the express text and limits found in Constitution;[68] furthermore, any restrictions imposed must be reasonable.[69] The question, then, may not be one of constructive suppression, but one of reasonableness. The next section will address if the one-year statute of limitations imposed by the AEDPA is unreasonable and what factors the court has looked to in its determination; by examining why courts believe the one year statute of limitations to be reasonable, by applying the same analysis and exploring the same factors, it may be possible to determine if a further truncated time-line would be acceptable.

IV. The Antiterrorism and Effective Death Penalty Act: The Impetus, the Law, the Problems, and the Suspension

A. The Impetus

The Antiterrorism and Effective Death Penalty Act was signed into law on April 24, 1996, nearly a year to the day after the Oklahoma City bombing,[70] and marked the first time in almost fifty-years that habeas was reformed by statute.[71] The measure passed with the overwhelming support in both houses of Congress, by a vote of 91-8 in the Senate and 293-133 in the House, with little evidence in the Congressional Record of any controversy.[72] If the reasons for the creation of the law aren't clear enough, the heading of the law provides that the AEDPA "is an Act to deter terrorism, pro-

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[68] Brent E. Newton, *A Primer on Post Conviction Habeas Review*, CHAMPION, June 2005 at 16, 17 (2005).

[69] *Id.* (citing Felker v. Turpin, 581 U.S. 651 (1996)).

[70] 28 U.S.C. §§ 2244-2266 (2000), as *amended by* Pub. L. No. 109-77, 120 Stat. 250 (2006).

[71] Kappler, *supra* note 27, at 474.

[72] Marshall, *supra* note 3 at 562 n.65; *see also* Alexander Rundlet, Comment, *Opting for Death*, 1 U. PA. J.CONT. L. 661 (1999) (exploring the legislative history behind the Act).

vide justice for victims, [and] provide for an effective death penalty."[73] In response to the Oklahoma City Bombings and the subsequent possibility of a trial, Senator Hatch commented in 1996 that: "The American people do not want to witness the spectacle of these terrorists abusing our judicial system and delaying the imposition of a just sentence by filing appeal after meritless appeal."[74] Evidently, Congress and the public seem to perceive habeas claims as without merit.[75] Even before the bombing, however, there were proposed habeas reforms already circulating in Congress,[76] but it appears the bombing was the "impetus" needed to enact the habeas reforms.[77] Additionally, the pressures to pass the bill appear to have been more politically (it was an election year) and judicially motivated (Chief Justice Rehnquist and others on the Court were strongly urging the passage of the reform) than in response to the needs of the victims.[78] Furthermore, some argue that habeas law was more impacted by the AEDPA than domestic terrorism.[79]

B. The Law

"The fix was in and the happy days of habeas were gone. Gone were the years of waiting to carry out executions: AEDPA's 'opt-in' provisions with the short state of statute of limitations . . . would eliminate the interminable delays and fast track death."[80] The AEDPA addressed a variety of habeas corpus procedural issues: it created a statute of limitations; placed significant restrictions on successive applications for

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[73] Antiterrorism and Effective Death Penalty Act, Pub L. No. 104 32 110 Stat. 1214 (text of heading).

[74] Marshall, *supra* note 3, at 561 n.61. (citing 142 Cong. Rec. S3352, S3354 (daily ed. Apr 16, 1996)).

[75] Marshall, *supra* note 3, at 560 n.56 (citing Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1489 (1996)).

[76] Marshall, *supra* note 3, at 560.

[77] McCollough, *supra* note 26, at 374.

[78] Marshall, *supra* note 3, at 562 n.63.

[79] Marshall, *supra* note 3, at 560.

[80] Blume, *supra* note 11, at 259-60.

relief; limited the ability of federal courts to hold evidentiary hearings in those same proceedings; modified the requirement of exhaustion of state remedies; implemented a stringent procedural default rule; and, altered appeals of habeas matters.[81]

Additionally, the AEDPA altered habeas proceedings in two further significant ways: (1) it significantly limited the circumstances under which relief can be granted in response to a habeas petition; and, (2) created a process by which States could gain additional procedural advantages in habeas proceedings, including further truncating the federal habeas corpus statute of limitation, if they met specific guidelines.[82] The "AEDPA envisions a quid pro quo arrangement under which the states are accorded stronger finality rules on . . . habeas review in return for strengthening the right to counsel for indigent capital defendants."[83] Because the scope of the AEDPA provisions are prolific, this section will focus on the "opt-in" provision which grants states, among other things, the power to further truncate the habeas time-line, which is arguably an effective suppression of the writ of habeas corpus.

Before the AEDPA, there was no time frame within which an individual convicted and sentenced for a state crime had to file for habeas relief;[84] however, now, under the AEDPA, a one-year statute of limitations is imposed.[85] Typically, the statute of limitation begins to run on the date in which the United States Supreme Court denies certiorari on direct appeal.[86] Although this base line statute of limitations may serve the stated goals of the AEDPA,[87] the "opt-in" provision of the AEDPA, is the highlight of the AEDPA. Originally, the Act specified that in order to "opt-in," the state legislature, a rule of court, or any other administration agency must "estab-

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[81] Blume, *supra* note 11, at 270-71.
[82] *Id.*
[83] Wright v. Angelone, 944 F. Supp. 460 (E.D. Va. 1996).
[84] Blume, *supra* note 11, at 270.
[85] 28 U.S.C. § 2244(d)(1) (2000).
[86] Blume, *supra* note 11, at 270.
[87] *See supra* note 67.

lish a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State post-conviction relief proceedings brought by indigent prisoners."[88] Additionally, that state legislature or state court must establish what the level of competency is[89] and the competent counsel cannot have represented the defendant at trial, or on direct appeal, unless expressly agreed to.[90] Finally, the state must provide notice to the court that each capital defendant has been offered assistance, has refused assistance, or has been denied assistance because they are not an indigent.[91] Once a state met these specification, 28 U.S.C. § 2263 set the statute of limitations for the filing for habeas corpus relief at 180 days[92] and an additional 30 days is available when a motion is filed and good cause is shown.[93]

C. The Problems

Although the statute is not replicated here verbatim, the flaws inherent to the statute are obvious. More than nine years after the enactment of the AEDPA, not a single jurisdiction has been able to opt in.[94] The statute is poorly drafted and ended up unwieldy, awkward, and confusing, leaving courts to grapple with the language.[95] Justice Souter commented, "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[96] Similarly, Justice Scalia asked an attorney at oral argument, "Who is responsible for writing this?"[97]

No where in the statute does it definitely state who has

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[88] 28 U.S.C. § 2261(b) (2000).

[89] *Id.*

[90] 28 U.S.C. § 2261(d) (2000).

[91] 28 U.S.C. § 2261(c) (2000).

[92] 28 U.S.C. § 2263(a) (2000).

[93] 28 U.S.C. § 2263(b)(3)(a)-(b) (2000).

[94] Blume, *supra* note 11, at 260.

[95] McCollough, *supra* note 26, at 375.

[96] Blume, *supra* note 11, at 261 (citing Lindh v. Murphy, 521 U.S. 320, 336 (1997)).

[97] *Id.* (citing Transcript of Oral Argument at 14, Dodd v. United States, 545 U.S. 353 (2005)).

the power or should establish the qualifications for the State; additionally, there is no indication as to who decides when a state has met these requirements and how a state makes its capital prisoners aware that the state has "opted-in." These same issues arose in *Death Row Prisoners of Pennsylvania v. Ridge*,[98] in which death row inmates filed a § 1983 action seeking determination as to whether Pennsylvania had met the requirements of opting in; the court there found that nothing in the statute described how capital prisoners could determine which federal rules applied in their respective state.[99] Furthermore, courts have not given states the benefit of the shortened filing deadline in cases where the level of competency has not been defined;[100] in cases where the state fails to follow their own "opt-in" procedures;[101] or, where the competency level of the attorneys is questionable.[102]

One of the most notable voids left by the Act was the responsibility for the determination of when a state had successfully "opted-in." This void is most often filled by the courts. The *Ridge* court determined that it, the court, had the authority to determine whether or not the state had "opted-in."[103] The *Angelone* court, too, determined that it, the court, would decide whether the shortened time frame applied to petitioners by examining the state system at the time of the petitioner was first appointed counsel.[104] Despite these courts, which actively established that they would determine when and if the state had "opted-in," the mere lack of an authority to say when and if a state has met the requirements of the law suggests that it is the province and duty of the court to say what this law is. This may be a source of contention later.

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[98] 948 F. Supp. 1258 (E.D. Pa. 1996).
[99] *Id.* at 1275-76.
[100] Booth v. Maryland, 940 F. Supp. 849 (D. Md. 1996).
[101] Tucker v. Moore, 56 F. Supp. 2d 611 (D.S.C. 1999).
[102] Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996).
[103] 948 F. Supp. 1258, 1279 (E.D. Pa. 1996).
[104] 944 F. Supp. 460, 464 (E.D. Va. 1996).

D. The Suspension

Despite problems elsewhere, there are few problems with the one-year statute of limitations generally imposed by the original AEDPA; the established time limit is constitutional and does not present issues of suspension.[105] However, in determining that the one-year statute of limitations imposed by the AEDPA did not violate a petitioner's right to the writ, the court in *Rodriguez v. Artuz*[106] found that the limitations on the time limit was not *per se* unreasonable and that all the Act required was that the petitioner act expeditiously.[107] The statute of limitations in the AEDPA does not *ordinarily* violate the suspension clause,[108] but whether the suspension clause has been violated by that time frame is contingent upon whether it renders the remedy of habeas inadequate or ineffective to test the legal detention.[109]

V. THE SUNSET PROVISION THAT SHINED NEW LIGHT ON THE AEDPA

The USA Patriot Act[110] was originally passed shortly after the attacks on September 11th; however, the Act contained a general "sunset" provision providing for the expiration of the Act on December 31, 2005.[111] Although the original Act only mentioned habeas rights in passing, in regards to terror suspects and immigrants, the Patriot Act Renewal Bill addressed habeas corpus rights directly, amending the AEDPA in regards to oversight of the "opt-in" provision and altering when an attorney could re-represent a client during post conviction

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[105] Cortoreal v. Artuz, 281 F. Supp. 2d 524, 527 (E.D.N.Y. 2003); *see also* U.S. v. Keebler, 49 Fed. Appx. 267 (10th Cir. 2002); Molo v. Johnson, 207 F.3d 773 (5th Cir. 2000).

[106] 990 F. Supp. 275 (S.D.N.Y. 1998).

[107] *Id.* at 278-79.

[108] M.P. v. Perlman, 269 F. Supp. 2d 36, 39 (E.D.N.Y. 2003).

[109] Swain v. Pressley, 430 U.S. 372, 381 (1977).

[110] Pub. L. No. 107-56, 115 Stat. 272 (2001) (amended 2006) (codified in scattered sections of titles 8, 15, 18, 22, 31, 42, 49, and 50 of the United States Code).

[111] Pub. L. No. 107-56 (224)

proceedings.[112]

A. The Changes

Under the now amended provisions of the AEDPA, the procedural advantages of opting-in are available to a state when the Attorney General of the United States certifies that a state has established a mechanism for providing counsel in post-conviction proceedings and counsel was appointed via the mechanism; the right was waived; the petitioner retained counsel; or, petitioner was denied assistance because the prisoner was not indigent.[113] Although a large portion of 28 U.S.C. § 2261 was deleted, many of the provisions were added to an amended 28 U.S.C. § 2265; furthermore the problem of when a state has officially "opted-in" has been added to § 2265 but the AEDPA still has not addressed how the state will inform its death row inmates that its status has changed. Additional to the amendments made to § 2265 are provisions providing review powers exclusively to the U.S. Court of Appeals for the District of Columbia Circuit to review the determinations made by the Attorney General in terms of "opting-in" and further review powers to the United States Supreme Court.[114]

B. The Attorney General

It is paradoxical, however, that in order to give states a better chance at complying with the provisions of § 2261, Congress had to remove from the states the authority to design and implement the "opting-in" provisions and return that authority to the federal government. It is ironic simply because it appears that Attorney General Alberto Gonzales will be more lenient in his determination that the states have met the provisions of § 2261 than the courts.[115]

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[112] 28 U.S.C. §§ 2261(b), (d), *as amended by* Pub. L. No. 109-77, 120 Stat. 250 (2006).

[113] *Id.*

[114] 28 U.S.C. § 2265, *amended by* Pub. L. No. 109-77, 120 Stat. 250 (2006).

[115] *See* Alan Berlow, *The Texas Clemency Memos,* ATLANTIC MONTHLY, Ju-

Because the AEDPA is focused on decreasing the time provided for habeas process for capital prisoners, one must wonder how stringent a standard the Attorney General will use to certify that a state has "opted-in" and if he will be influenced by the President. Although it may be unfair to prejudge Attorney General Gonzales, Texas Clemency Memos written by Attorney General Gonzales call into question his objectivity in regards to the death penalty.

C. The Texas Clemency Memos[116]

During George W. Bush's tenure as the Governor of Texas, 150 men and two women were executed, a gubernatorial record in modern American history.[117] When a death sentence loomed, typically on the morning of a scheduled execution, then-Governor Bush would receive a prepared document from his attorney providing the facts of the case and then later provided with an oral briefing on the issue.[118] From this information the Governor decided whether or not to recommend that the execution proceed; in all but one of those cases, he did.[119] Aside from the death toll, this time in history is significant because of the summaries provided to the Governor, the first fifty-seven were created/written by Alberto Gonzales.[120] Those who have read the clemency memos, which were never made public, suggest that many of the terse summaries "have a clear prosecutorial bias"[121] and seem to assume that if the court of appeals denied a prisoner's claim then there was no basis to grant clemency.[122] Although this

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ly/August 2003, *available at* http://www.niemanwatchdog.org/index.cfm?fuseaction=showcase.view&showcaseid=008.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Alan Berlow, The Texas Clemency Memos, ATLANTIC MONTHLY, July/August 2003, *available at* http://www.niemanwatchdog.org/index.cfm?fuseaction=showcase.view&showcaseid=008.

[122] *Id.*

may not be surprising in a Southern state in the "death belt" with a Republican governor, what is surprising is that often times evidence of clemency, such as mental impairment or retardation, innocence, or ineffective counsel, was apparently overlooked, ignored, or not brought to the Governor's attention;[123] in one instance, a memo was devoid of any mention of a defendant's attorney falling asleep during trial.[124] Gonzales' clemency memos raise suspicions regarding the thorough and judicious review of the clemency petitions. The memos seem to focus on minimizing any sense of responsibility of the Governor in making these decisions.

However, Gonzales is not without his supporters. In his confirmation hearings to become Attorney General, Senator Sessions (R-AL), made the point that Mr. Gonzales served as both White House Counsel and counsel to the Governor in Texas and, in that capacity, served the interest and represented the positions of the executive branch;[125] there is no doubt that he serves the interest and represents the positions of the executive branch well. Unfortunately, this position provides no comfort. Even if Alberto Gonzales is not a hard line death penalty opponent as an individual in the capacity as Attorney General, the individual whom he serves and the branch he represents is.

VI. Effective Suppression, Analysis

A. Will the Amended AEDPA Create More Jurisdictions With a Truncated Application Deadline for Federal Habeas Relief?

There doesn't seem to be an easy answer as to what effects the amendments by the Patriot Act on the AEDPA will have in the long term; however, there are certain guide posts that point that way. To begin, in the almost 10 years since the enactment of the AEDPA, not a single jurisdiction has been

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[123] *Id.*

[124] *Id.*

[125] Alberto Gonzales Attorney General Confirmation Hearings, available at http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6_4.html.

able to opt-in to the provisions which would give both a procedural benefit and truncated time line in federal habeas proceedings to the state. Going on the assumption that laws are changed because our needs change; because the law becomes unnecessary; or, because the law is ineffective, it would appear that the amendment to the AEDPA was not changed because the world had changed, or that Congress simply decided that the federal habeas process no longer needed reform. It seems that the amendment to the AEDPA is to make the law more effective and to ensure that it is implemented as it was intended—the law was intended to make the death penalty "more effective" and to shorten the time period of federal habeas proceedings.

Why wasn't the AEDPA originally effective and implemented successfully? Arguably the poor design and wording of the statute itself may be to blame. Conversely, one must wonder if Congress believed the reason that the AEDPA was ineffective was because the courts were, by default, the entity which determined whether or not a state met the provisions of the statute and that the Act failed because courts were never satisfied that the provisions were met. Furthermore, the replacement of the courts by the Attorney General (who serves the interest and represents the opinions of an executive branch which is a staunch supporter of the death penalty) as the entity to decide when a state meets the provisions specified in the AEDPA seems logical if Congress wants to further the purpose the statute, which is expedited habeas review. From this, the conclusion must be that the amendment of the AEDPA by the Patriot Act, which replaced the courts with the Attorney General, was designed to further the AEDPA, its "opt-in" provisions, and the shortened statute of limitations on federal habeas review; additionally, if the view of the Attorney General or the President are in anyway reflected accurately in the Texas Clemency Memos,[126] one must conclude that the Attorney General will generally be more lenient in allow states to opt-in and thus speed the pace of death sentences;

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[126] *See supra* note 115.

however, that is not to say that the Attorney General will not follow the law.

B. Is the Six-Month Statute of Limitations an Effective Suppression of The Writ?

If, as suggested, a one-year statute of limitations on applications for federal habeas relief would be an "unmitigated disaster" and almost always an insufficient time limit,[127] where does that leave practitioners and their clients in jurisdictions that have the 180-day deadline? During those 180 days, after being assigned, counsel must pursue state post-conviction relief, and prepare a federal habeas petition, filled with facts, mitigating circumstances, and errors at all levels of the court. Compounding this problem is that Congress recently cut the Post Conviction Defender Organizations funding, an organization which supported a wide network of qualified habeas attorneys;[128] yes, Congress has made the habeas process more timely and efficient. However, Congress has also made the process far less fair, meaningful, and this efficiency has come at the expense of the protection of constitutional rights.[129]

Furthermore, what the 180-day limitation does not adequately reflect is that if a state has post-conviction relief, a petitioner's application for federal habeas relief will be untimely if submitted before all state remedies are exhausted, but the truncated time line begins to run from the affirmance of the conviction, not the exhaustion of state remedies. However—if (as the court discussed in *Swain*[130]) whether the suspension clause has been violated by a time frame is contingent upon whether it renders the remedy of habeas inadequate or ineffective to test the legal detention—how could a 180-day time period not render the remedy of habeas inadequate?

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[127] McCollough, *supra* note 26, at 379-80.

[128] James E. Coleman, Jr., *Forward*, 61 LAW & CONTEMP. PROBS. 1, 2 (1998) (citing Pub. L. No. 104-134, 110 Stat. 1321, 1321-34 (1996)).

[129] *Id.*

[130] 430 U.S. 372 (1977).

Because these petitions take the longest to prepare and because these petitioners have the most at stake, why make death and capital habeas petitions different to the *detriment* of the prisoner/defendant rather than to their benefit? The creating and filing of a capital habeas petition within this abridged statute of limitations, while trying to manage state post-conviction relief—and taking into account the time and energy involved in the petition—along with any "catch-up" required for a newly appointed counsel to a petitioner's case, should be considered an effective suppression of the writ of habeas corpus in violation of Article I, Section 9, clause 2 of the United States Constitution.

Keir Weyble, habeas attorney and author, believes that in a wide array of instances, the 180-day time period will be insufficient to adequately complete state conviction relief and finish a habeas petition; however, he further believes that courts won't buy the "suppression" argument.[131] Additionally, Denise Young, of the National Coalition to Abolish the Death Penalty, speculated as to how the district and circuit courts would be able to handle the time-line imposed by the judiciary in the AEDPA.[132] If Weyble is correct, and the courts won't bite on the suppression argument, what is the alternative? Equitable tolling—this seems to be the only responsible way to have both the procedural advantages for the state as well as maintain a sense of fairness for which the writ was intended.

C. Back to The Habeas Debate

The irony of this entire issue is that habeas petitions by those on death row make up only 1% of habeas petitions;[133] one side is arguing to protect the rights of the a very small minority, while the other side is arguing that the voluminous

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[131] E-mail from with Keir Weyble, Partner, Blume, Weyble, & Norris, LLC, to Kathryn E. Wetherbee (May 11, 2006) (on file with author).

[132] E-mail from Denise I. Young, Attorney, National Coalition to Abolish the Death Penalty, to Kathryn E. Wetherbee (Mar. 10, 2006) (on file with author).

[133] Roger A. Hanson & Henry W. K. Daley, U.S. DEP'T OF JUSTICE FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS iv (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf.

repetitive writs of death row inmates must be controlled! The U.S. Department of Justice report calls into question the assumption on both sides of the habeas debate; that habeas petitions from death-penalty cases take up a disproportionate amount of judicial resources; demand a significant amount of attention from the court; and, cause the court to focus on the overwhelming quantity of capital habeas litigation to the detriment of non-capital petitions.

D. Final Thoughts

For nearly the past ten years, the courts have been the ones determining whether a state has met the requirements of § 2261. Arising from this history are two distinct issues. First, is the Attorney General, who is responsible for the enforcement of the laws, the appropriate official to look out for the interest of those whom he seeks to bring to justice? Yes, there is a separation of powers issue, there seems to be a conflict of interest arising as well—how can an enforcer of the law also attempt to protect those who break the law? Secondly, if the original authority to grant federal courts the right to review state petitioners claims for habeas relief arose from concerns of federalism following the civil war and reconstruction, what has changed? The Fourteenth Amendment is more relevant today than when it was enacted. Although it is arguable that habeas corpus does not apply to the states, history from the Constitutional Convention seems to suggest otherwise. If the impetus, even if predicated on incorrect precedent, was to provide the writ because the states could not be trusted to adequately protect the rights of their citizens, the rights of the individual over the state should prevail.

Finally, if a suppression of the writ occurs when habeas is rendered ineffective, it appears that the "opt-in" provision of the AEDPA and subsequent truncated habeas statute of limitations during which to request federal habeas support will significantly impair capital petitioner's rights to effective habeas review.

ELIMINATING INJUSTICE: REVISING MISSISSIPPI'S STATUTORY RAPE LAWS

Alexandra Hutton Oglesby[*]

I. INTRODUCTION

A problem is presently lurking in the Mississippi criminal code. The problem is not a large one in terms of the number of individuals it could potentially affect, but at the root of the problem lies a disregard for the necessity of ensuring fairness and justice to all of Mississippi's citizens equally. Such disregard has plagued Mississippi in the past, and the state's history is littered with examples of the majority's disregard for, and sometimes vehement and violent rejection of, policies, practices, institutions, and laws that were designed to protect numerical minorities.[1] Therefore, modern Mississippians who might seek to improve the state's image and status in this country and in history should be aware of the existence of any potential for injustice in Mississippi's legal system, no matter how small that potential may seem.

This Article seeks to expose the seemingly small but assuredly pernicious problem embedded in the laws regarding the treatment of statutory rape prosecutions in Mississippi. Statutory rape in Mississippi,[2] as it is in a majority of jurisdictions, is a strict liability crime derived from the "public wel-

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[1] The troubling history of Mississippi with regard to minorities' civil rights in particular has been well documented, even in popular culture media, such as Orion Pictures' 1988 award-winning movie "Mississippi Burning," which has a tagline of "1964. When America was at war with itself." *See* IMDb.com, Mississippi Burning, http://www.imdb.com/title/tt0095647 (last visited Mar. 15, 2007).

[2] The most pertinent section of the Mississippi Code for the purposes of this Article is title 97, chapter 3, section 65 of the Mississippi Code.

fare offense" tradition.[3] Thus, prosecutors are practically guaranteed conviction once an indictment has been handed down since the only proof required for conviction is proof of the act of proscribed sexual activity with an underage partner.[4] In many cases involving statutory rape, such ease of conviction is both fair and just for all parties involved;[5] however, some cases do exist which present questions regarding a defendant's level of mental culpability that cast serious doubt on any "justice" that might have been done by conviction. Is justice accomplished when neither judge nor jury directly considers any evidence pertaining to the fundamental issue in criminal law of the *mens rea* that is generally required to accompany the *actus reus* of a crime before a conviction can be gained?[6]

If Mississippians want to help their state join other jurisdictions which seem to hold the concepts of fairness and justice for all individuals in the highest regard, one step they can take in that direction that may be more significant than it seems is to demand revision of the state's current statutory rape laws. Mississippi needs a justice system that allows for a mistake of age defense for statutory rape defendants who might reasonably claim to have had no idea that their sexual partner was under the legal age of consent and, thus, had no reason to believe that they were engaging in an activity that

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[3] Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 343-44 (2003).

[4] *Id.*

[5] *See, e.g.*, Foley v. State, 914 So. 2d 677 (Miss. 2005) (affirming the conviction and sentencing of Scott Anthony Foley to life imprisonment for various sexual acts performed on his five-year-old adopted niece).

[6] *See* Morissette v. United States, 342 U.S. 246, 250-51 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution."). However, most states which employ some version of a strict liability statutory rape scheme involving no *mens rea* requirement cite *Morissette*, due to misplaced reliance on dicta from that case, as the basis for allowing such a practice. Carpenter, *supra* note 3, at 318 (referring to the dicta found in *Morissette*, 342 U.S. at 251 n.8).

was potentially subject to any criminal penalties,[7] much less subject to the severe penalties available under the current statute.[8] If Mississippi is proactive in designing and implementing such a revision, although it may not ultimately affect a vast number of prosecutions, those cases to which it does pertain would be more likely to result in true justice being done for all involved, including defendants, victims, and society at large. Mississippi needs simply to recall its history to remember that when even one person's likelihood of receiving a fair and just outcome under a particular legal system improves, so improves the esteem in which others, both from within and without, perceive that system as well.

II. A Brief History of the Crime of Statutory Rape

The crime of statutory rape appears in substance as far back in time as the 4,000-year-old Code of Hammurabi, which provided that a man be seized and slain if he raped a betrothed virgin, whom the law considered to be an innocent victim.[9] It was not until 1275 A.D. that the Statutes of Westminster established the first known English definition of the offense of statutory rape, making it illegal to "ravish" a female under the age of twelve years; English law lowered the age at which a female could legally consent to sexual relations to ten years old in 1576 A.D.[10]

In the early years of the development of the American system, statutory rape laws were absorbed into the legal land-

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[7] *See* discussion *infra* Parts V, VI (describing the constitutional and other problems associated with the lack of notice since *Lawrence v. Texas*, 539 U.S. 558 (2003)).

[8] *See* Miss. Code Ann. § 97-3-65 (2006).

[9] Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA. L. Rev. 757, 762 n.34 (1980) (citing C. Edwards, The Hammurabi Code and the Sinaitic Legislation 46, 51 (1904)).

[10] 6 Am. Jur. 2d *Proof of Facts* § 63 (2006); *see also* 5 Blackstone's Commentaries 212 (St. George Tucker ed., Philadelphia, Birch & Small 1803); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DePaul J. Health Care L. 109, 119 (2004); Eidson, *supra* note 9, at 762 nn.35-36.

scape via the English common law.[11] American case law has even specifically held that the definitive English statute from 1576 was part of the common law originally imported into the United States.[12] This trend in American case law signifies basic agreement with the legislative purpose and intent behind the original English statutes.[13] Such agreement has allowed the courts to interpret American statutory rape laws by relying upon long-standing historical reasoning to bolster the majority trend of classifying statutory rape as a strict liability crime with no availability of affirmative defenses, such as mistake of age of one's sexual partner.[14] Because of this

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[11] Oberman, *supra* note 10, at 119.

[12] Eidson, *supra* note 9, at 762 n.38 (citing Nider v. Commonwealth, 131 S.W. 1024, 1026 (Ky. 1910)). In *Nider*, the highest court in Kentucky addressed the case of Harry Nider against whom a conviction had been gained for "carnally knowing Cecil Luzader, a female under the age of 16 years." *Nider*, 131 S.W. at 1025. Due to evidentiary deficiencies, however, a conviction under the statutory language could not stand. *Id.* Still, the court reversed and remanded the case, instructing the lower court to enter a conviction for the lesser-included offense of attempt, although the language of the attempt statute did not follow that of the rape statute since it included the words "with her consent," whereas the rape statute did not. *Id.* at 1025, 1027. Due to this discrepancy, the opportunity for judicial filling in of gaps in the law was presented and the Kentucky court addressed the importation of English laws into the United States. *Id.* at 1025. Pertinent to the present discussion of the history and evolution of American statutory rape laws, the court stated, "If this was an offense at common law, then it would also be an offense in this state, even if we had no statute on that subject, as the common law of England and all acts of Parliament made in aid thereof have since the organization of this state been a part of the body not only of the criminal but the civil law, except where it has been abrogated or superseded by statute, or is repugnant to the spirit of our laws or the public policy of the state." *Id.* The court continued, "And so it is that, when there is a wrong to be punished, whether it be great or small, or an injury to be redressed, whether it be big or little, and no statute law of this state can be found that will afford the punishment or offer the remedy, we turn to the common law for relief." *Id.*

[13] *See* BLACKSTONE'S COMMENTARIES, *supra* note 10, at 212. *Blackstone's Commentaries* stated that the intent of the 1576 statute, 18 Eliz. c. 7 (Eng.), which lowered from twelve to ten years the age of the "woman child" whose protection from carnal knowledge and abuse was paramount, did not turn upon the consent or non-consent of the female; rather, the core of the statutory protection was the premise that, "by reason of her tender years she is incapable of judgment and discretion." *Id.*

[14] Carpenter, *supra* note 3, at 318. For example, the Mississippi Supreme Court, as an issue of first impression, addressed the legislative intent behind the

method of judicial interpretation, such strict liability criminal statutes continue to thrive in the modern era, causing unfair, unjust, and possibly even unconstitutional outcomes in statutory rape prosecutions around the country today.[15]

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statutory rape law as it was then codified in title 97, chapter 3, section 65 of the Mississippi Code, when it delivered its opinion in *Collins v. State*, 691 So. 2d 918 (Miss. 1997). The court stated, "Further, 'the history of the offense of statutory rape indicates that from ancient times the law has afforded special protection to those deemed too young to understand their actions.'" *Collins*, 691 So. 2d at 923 (quoting United States v. Ransom, 942 F.2d 775, 776 (10th Cir. 1991)). Such language parallels that of Blackstone, and, as would be expected, the Mississippi Supreme Court went on to hold, "The 'mistake of age' defense could hardly coexist with our statutory rape statute which is intended to set forth the 'age of consent.'" *Id.* "If reasonable mistake were recognized as a defense, the very purpose of the statute would be frustrated and the deterrent effect considerably diminished." *Id.* This is just one of many examples of courts' use of historical reasoning to keep statutory rape classified as a strict liability crime without the availability of affirmative defenses, such as mistake of age. For other examples, see *United States v. Ransom*, 942 F.2d 775, 777 n.2 (10th Cir. 1991), which cites *Blackstone's Commentaries* in support of its holding that the mistake of age defense is invalid; and *Garnett v. State*, 632 A.2d 797, 798 n.1 (Md. 1993), which upheld the rejection of a mistake of age defense to the strict liability crime in the case of a mentally retarded twenty-year-old male convicted of having sex with a thirteen-year-old female who had represented to him that she was sixteen-years old, citing for support thereof the codification of the criminal law by the Maryland Legislature in 1809.

[15] *See, e.g.*, State v. Jadowski, 680 N.W.2d 810 (Wis. 2004); *see also* Walker v. State, 768 A.2d 631 (Md. 2001). Both of these cases involved defendants charged with statutory sexual offenses who attempted to present a defense of reasonable mistake of age, but both were unsuccessful. In *Jadowski*, a thirty-five-year-old male was charged under a statute making it a strict liability crime to have sexual intercourse with a child under the age of sixteen. 680 N.W.2d at 813. The "victim" was just five and a half months shy of her sixteenth birthday, and, according to the defendant's offer of proof at an evidentiary hearing, was a "chronic runaway" who represented to Todd Jadowski and others that she was nineteen-years old by using an apparently state-issued identification card and informing them that she was old enough to work as an exotic dancer. *Id.* at 813-14. As a result of the Wisconsin Supreme Court's refusal to allow Jadowski to raise mistake of age as a defense, he pled no contest to the felony charge of Second Degree Sexual Assault of Child and received a deferred sentence of three years, subject to certain conditions and taking into account in his sentencing other unrelated charges and his lack of any substantive prior criminal record. Case Details for 2002CF000190 in Sheboygan County, http://wcca.wicourts.gov/index.xsl (click "I Agree" link in center of the page; at "Simple Case Search" page enter "Jadowski, Todd," in the Party Name field, select "Sheboygan" from the County dropdown menu, and click "Search"; click on link to "Case Number 2002CF000190"; click

III. STATUTORY RAPE IN MISSISSIPPI: THE LEGISLATIVE LANDSCAPE

Until 1998, the statutory rape laws in Mississippi could have rendered incredibly unjust (and what have now been determined to be unconstitutional) results if the statutory provisions had been applied in situations as this Article contemplates involving innocent-minded defendants who have engaged in consensual sexual intercourse with a partner they believed to be of legal age but who in reality was a dissembling "victim."[16] Had he been convicted under Mississippi's pre-1998 statute,[17] for example, Raymond, the mentally re-

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"View Case Details"; click on link to "View history and details of Charge(s)/Sentence(s)) (last visited Mar. 15, 2007). In *Walker*, a twenty-nine-year-old male was charged under a statute making it a strict liability crime to have "[v]aginal intercourse with another person who is 14 or 15 years of age and the person performing the act is at least 21 years of age." 768 A.2d at 632 (citing MD. ANN. CODE art. 27, § 464B(a)(5) (1996)). Walker wanted to raise the defense of reasonable mistake of age, as his "victim" was a runaway with whom he had been living and engaging in a consensual sexual relationship. Initially, Walker was under the impression that his "victim" was nineteen-years old; later, he was under the impression that she was seventeen-years old (the minimum age required for employees of the supermarket where she and Walker had met and worked together). *Id.* Maryland, however, declined to allow such a defense, and the trial court found Walker "'technically' guilty of a third degree sexual offense," did not require that he register as a sex offender, sentenced him to serve six months suspended, and ordered him to serve unsupervised probation for one year. *Id.* at 633. Although neither Jadowski's nor Walker's punishment was particularly harsh, the fact that they were prosecuted at all for innocent-minded consensual sexual relations seems unjust. Also, had they been in other jurisdictions, such as Mississippi, their punishments could have been much more severe. *See infra* note 25 and accompanying text. For further discussion about the *Jadowski* and *Walker* cases, see Arnold H. Loewy, *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 SMU L. REV. 77, 95-101 (2005).

[16] For a discussion about the defendant in *Garnett*, see *supra* note 14; *infra* notes 18, 20 and accompanying text.

[17] Prior to its revision in 1998, title 97, chapter 3, section 65(1) of the Mississippi Code read, in pertinent part,

> Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, shall be sentenced to death or imprisonment for life in the State Penitentiary; provided, however, any person thirteen (13) years of age or over but under eighteen (18) years of age convicted of such crime shall be sentenced to such term of impris-

tarded twenty-year-old defendant in *Garnett*,[18] could have been sentenced to death upon his conviction for a strict liability crime[19]—a conviction which was a foregone conclusion under the facts of the case.[20] Fortunately for Mississippi defendants (and for the state's national image), very few actual mistake of age cases occurred in the state during the reign of the pre-1998 statutes to suggest that a large number of serious injustices may have been done during that time.[21]

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onment as the court, in its discretion, may determine. In all cases where the child is under the age of fourteen (14) years it shall not be necessary to prove penetration of the child's private parts where it is shown the private parts of the child have been lacerated or torn in the attempt to have carnal knowledge of the child.

MISS. CODE ANN. § 97-3-65(1) (1994) (repealed 1998).

[18] *See supra* note 14 and accompanying text (discussing the holding of *Garnett*). The defendant had an I.Q. of only fifty-two points, and it was testified to at trial that he functioned socially at the level of an eleven or twelve-year-old child. *Garnett*, 632 A.2d at 798.

[19] In 1998, such a result would have been constitutionally allowed, as the United States Supreme Court had not yet abrogated *Penry v. Lynaugh*, 492 U.S. 302 (1989), by its decision in *Atkins v. Virginia*, deeming the execution of mentally retarded criminals contrary to the Eighth Amendment of the United States Constitution and against this country's "'evolving standards of decency.'" *Atkins*, 536 U.S. 304, 321 (2002). However, since *Atkins*, even if Mississippi had not altered its statute to remove the possibility of death as a penalty for statutory rape, such "excessive" and unsuitable punishment as the execution of a mentally retarded defendant would be unconstitutional and no longer possible. *Id.*; *see also infra* note 25 (discussing Mississippi's removal of the death penalty for statutory rape crimes). For an early but pertinent commentary on the impropriety of subjecting any criminal defendants to strict liability in any felony situations, see Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933).

[20] In *Garnett*, the facts of the case did not permit the defendant much room to argue against conviction under a strict liability model absent a mistake of age defense, as approximately nine months after the date of the alleged sexual intercourse his young "victim" gave birth to a baby, of which the defendant was found to be the biological father. *Garnett*, 632 A.2d at 799.

[21] The example with the most sympathetic defendant appears to be the case of *Daniels v. State*, 742 So. 2d 1140 (Miss. 1999), in which then twenty-nine-year-old Richard Daniels, Jr., a/k/a "Bug," was convicted of capital rape and sentenced to life imprisonment under title 97, chapter 3, section 65 of the Mississippi Code for having had a consensual sexual relationship with a thirteen-year-old female, "Cheryl," who testified at Daniels's trial that he was under the impression that she was seventeen-years-old at the time of their sexual relationship. *Daniels*, 742 So. 2d at 1141-42. In that case, the trial judge even stated on the record that

However, though a multitude of highly-publicized and grossly unjust cases has not yet sprung forth as a result of Mississippi's failure to recognize a reasonable mistake of age defense, other similarly situated jurisdictions have provided enough examples of injustice to legitimize the concern that it is just a matter of time before Mississippi produces its own cases enabling blatant injustices as well.[22] Considering the problems that remain in the current strict liability statutory rape laws,[23] one hopes that the present dearth of examples signaling that great and widespread injustice is being wrought

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> "[i]n most capital rape cases, this Court would be very much in favor of the death penalty; not only a life sentence. But the facts in this case, while certainly under the statute does [sic] constitute capital rape, are considerably different from any capital rape case that I have seen before, where a child of very mature-appearing age and size has run away from home—and apparently the police could have gone to other places she lived on these different times she'd run away from home as testified by her mother and lived with other people apparently. That's neither here nor there as to the guilt of this defendant. . . . This Court has a serious concern, I will say for the record, that this Court, if it felt comfortable in sentencing this defendant to less than life, would do so."

Id. at 1144-45 (alteration in original) (quoting Trial Tr.). Fortunately for "Bug," the appellate court accounted for the recent amendments to the statute's sentencing mandates, and though it affirmed his conviction, it remanded his case to the Coahoma County Circuit Court for re-sentencing in line with the requirements of the newly amended statute. *Id.* at 1145. Apparently on re-sentencing, Daniels received twenty years to serve in the Mississippi Department of Corrections, where he remains incarcerated today with a tentative release date of July 27, 2018. *See* Mississippi Department of Corrections: Richard Daniels, http://www.mdoc.state.ms.us/InmateTest.asp (providing incarceration information about Richard Daniels, which can be viewed by entering Daniels's name and clicking "Find") (last visited Mar. 15, 2007).

[22] *See, e.g.*, *Garnett*, 632 A.2d 797 (Md. 1993); *see also* Owens v. State, 724 A.2d 43 (Md. 1999) (affirming the conviction of eighteen-year-old Timothy Owens, who had sexual intercourse with a thirteen-year-old girl who had told him she was sixteen). Owens was sentenced to eighteen months imprisonment, with all but the time served of twelve days suspended, eighteen months probation, and was ordered to register as a child sex offender and submit to DNA testing. 724 A.2d at 45. *See also, e.g.*, Commonwealth v. Dennis, 784 A.2d 179 (Pa. Super. Ct. 2001) (affirming the statutory rape conviction and sentencing of an eighteen-year-old man to five to ten years of imprisonment despite the defendant's desire to present evidence of mistake of age as to his belief that his twelve-year-old victim was sixteen).

[23] *See infra* note 25 and accompanying text (describing the current statute).

upon statutory rape defendants throughout Mississippi is indicative that prosecutors, both prior to and since 1998, were using and are continuing to use their prosecutorial discretion in screening, charging, and plea bargaining in cases in which the laws might render extremely unfair, unjust, and possibly unconstitutional results.[24]

Wisely, in 1998, the Mississippi Legislature substantially altered the landscape of statutory rape prosecutions in Mississippi when it enacted various amendments and repealed certain statutes comprising the body of the law covering statutory rape and other sexual offenses.[25] These changes somewhat

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[24] *See infra* Part IX (discussing in further detail some of the issues regarding prosecutorial discretion).

[25] Effective July 1, 1998, and continuing in force to date, title 97, chapter 3, section 65 of the Mississippi Code, titled, "Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances," was revised to read, in pertinent part:

> (1) The crime of statutory rape is committed when: (a) Any person seventeen (17) years of age or older has sexual intercourse with a child who: (i) Is at least fourteen (14) but under sixteen (16) years of age; (ii) Is thirty-six (36) or more months younger than the person; and (iii) Is not the person's spouse; or (b) A person of any age has sexual intercourse with a child who: (i) Is under the age of fourteen (14) years; (ii) Is twenty-four (24) or more months younger than the person; and (iii) Is not the person's spouse. (2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape. (3) Upon conviction for statutory rape, the defendant shall be sentenced as follows: (a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($5,000.00), or both; (b) If twenty-one (21) years of age or older and convicted under paragraph (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense; (c) If eighteen (18) years of age or older and convicted under paragraph (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years. (d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under paragraph (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

ameliorated a statutory rape defendant's situation and potential consequences, not making them ideal, but making them much less dire than before.[26] Unfortunately, Mississippi courts have not yet been willing to update the case law supporting the statutory rape laws in order to more accurately reflect the legislative intent behind those 1998 revisions.[27]

Mississippi legislators to this day continue to address statutory rape and other sexual offenses in their sessions, but the general tenor of their discussions does not bode well for criminal defendants charged with sexual offenses, with some rare exceptions, including proposed legislation in January 2007 which actually seeks to add *mens rea* elements to the crime of statutory rape.[28] Overall, however, it seems that the

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MISS. CODE ANN. § 97-3-65(1)-(3) (2006). Also effective July 1, 1998, the legislature repealed title 97, chapter 3, section 67 of the Mississippi Code, which had specified the penalties for carnal knowledge of an unmarried person between the ages of fourteen and eighteen, and title 97, chapter 5, section 21, which had specified penalties for seduction of a minor (a child under age eighteen). MISS. CODE ANN. §§ 97-3-67, -5-21 (1994) (repealed 1998). The repeal of these two particular statutes has significance, as they were specifically cited in *Collins v. State*, 691 So. 2d 918, 922 (Miss. 1997), the case which continues to serve as the jurisprudential foundation for the maintenance of strict liability with regard to statutory rape in Mississippi. *See supra* note 14 and accompanying text; *see also infra* Part IV.

[26] Take, for example, the mentally retarded defendant in *Garnett*. 632 A.2d 797. In Mississippi after 1998, Garnett would have been convicted under title 97, chapter 3, section 65(1)(b)(i)-(ii). Whereas prior to 1998, his conviction exposed him to a sentence of death or life imprisonment in the State Penitentiary, after July 1, 1998, such conviction would be sentenced per the provisions of title 97, chapter 3, section 65(3)(c), and he would only have faced the possibility of "imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years." MISS. CODE ANN. § 97-3-65(3)(c) (2006). *See supra* notes 14, 18, 20, 25 and accompanying text; *see also supra* note 21 and accompanying text (discussing *Daniels*).

[27] *Todd v. State*, 806 So. 2d 1086, 1097 (Miss. 2001), actually cites *Morissette* in its analysis and acceptance of the legislative reasoning behind denying any mistake of age defense, even a reasonable one. This reasoning is flawed. *See supra* note 6 and accompanying text. For further discussion of the Mississippi courts' failure to update its case law, see *infra* Part IV.

[28] *See, e.g.*, S.B. 2308, 2007 Leg., 122d Reg. Sess. (Miss. 2007) (proposing amendments to title 97, chapter 3, section 65 of the Mississippi Code that would require the elements of knowledge and willfulness be present for conviction of statutory rape). *But see* S.B. 2667, 2006 Leg., 121st Reg. Sess., 2006 Miss. Laws 328 (enacted March 9, 2006, and effective July 1, 2006) (amending several sec-

legislative proposals and amendments portend the coming of an era in which the general legislative intent in the state will increasingly result in the passage of laws designed primarily to aid prosecutors, deter crime through increased punishment, support victims, and protect local community values.[29] Although these are hardly deplorable goals, the danger exists that in aiming to achieve such goals the legislators will not fully recognize and remove the potential for unfair, unjust, and even unconstitutional convictions and sentences for those defendants lacking any level of mental culpability who have been charged with statutory rape as a true strict liability crime and then been denied any opportunity to assert their reasonable and honest mistaken belief as to their sexual partner's age as an affirmative defense.

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tions of the Mississippi Code to increase protections for vulnerable adults lacking the capacity to give consent, who are sexually battered or fondled when in a state of vulnerability similar to that vulnerable state which the legislature has deemed present in all children of a certain age according to the statutory rape and sexual offense laws); H.B. 755, 2007 Leg., 122d Reg. Sess. (Miss. 2007) (proposing to revise the maximum age of a victim of statutory rape to seventeen-years old); H.B. 449, 2007 Leg., 122d Reg. Sess. (Miss. 2007) (proposing imposition of the death penalty in statutory rape cases where victim is under age of thirteen years and defendant is eighteen years of age or older); H.B. 490, 2007 Leg., 122d Reg. Sess. (Miss. 2007) (proposing increase in penalties for certain sexual offenses committed against children); H.B. 103, 2007 Leg., 122d Reg. Sess. (Miss. 2007) (proposing castration as a penalty for defendants convicted of statutory rape and other sex crimes).

[29] *See, e.g.*, MISS. CODE ANN. § 45-33-23 (Supp. 2006) (requiring registration of all sex offenders convicted of rape under section 97-3-65, only excluding from this requirement those convicted or adjudicated under section 97-3-65(1)(a) on or after July 1, 1998, who were eighteen years or younger at the time of the alleged offense); MISS. CODE ANN. § 99-1-5 (Supp. 2006) (excepting from time limitations the filing of charges against defendants accused of crimes involving exploitation of or sexual offenses against children); MISS. CODE ANN. § 99-19-75 (Supp. 2006) (effective July 1, 2005, and adding "an assessment of One Thousand Dollars ($1,000.00) to be deposited into the Mississippi Children's Trust Fund" "for any violation of §§ 97-3-65, 97-5-1 et. seq. or 97-3-7"); MISS. CODE ANN. § 99-41-1 to -31 (2000) (Mississippi Crime Victims' Compensation Act).

IV. Statutory Rape in Mississippi: The Judicial Landscape

As previously mentioned, the 1997 case, *Collins v. State*, reflected the Mississippi Supreme Court's interpretation of the legislative intent girding the statutory rape statutes in place at that time.[30] However, in spite of the significant revisions to the legislative landscape surrounding statutory sexual offenses that took place in 1998,[31] Mississippi's judicial branch has yet to follow the lead of the legislature and rethink or reframe its position of acceptance of statutory rape as a strict liability crime with no reasonable mistake of age defense available.

Indeed, a brief review of recent statutory rape cases in Mississippi reveals that *Collins* remains the case, either by itself or through its progeny, that the courts cite in support of their continued maintenance of the status quo of strict liability with no mistake of age defense available for charges of statutory rape and similar sexual offenses.[32] This continues to be done in spite of the fact that the *Collins* court's first im-

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[30] *Collins*, 691 So. 2d 918; *see also supra* notes 14, 17 and accompanying text.

[31] *See supra* note 25 and accompanying text.

[32] *Collins*, 691 So. 2d 918, and/or its progeny have consistently been cited for the holding that mistake of age is not a defense to statutory rape and similar strict liability crimes. *See* Phillipson v. State, 943 So. 2d 670, 672 (Miss. 2006) (citing *Collins* for the holding that "a defendant cannot maintain a 'mistake of age' defense"); *Todd*, 806 So. 2d at 1096-97 (referring to both *Collins* and *Daniels* as "unambiguously reject[ing]" the mistake of age defense for statutory rape and employing the same reasoning as was used in *Collins* to extend the rejection of such defense to charges of fondling and sexual battery); Daniels v. State, 742 So. 2d 1140, 1144 (Miss. 1999) (citing *Collins* but still operating under the pre-1998 statute); Farrish v. State, 920 So. 2d 1066, 1067 n.1 (Miss. Ct. App. 2006) (citing *Daniels* as the authority for the proposition that "a mistake of age is not a defense to statutory rape"); Sanders v. State, 825 So. 2d 53, 57 (Miss. Ct. App. 2002) (citing *Todd* in holding that "[i]t is well settled that mistake of age is not a defense to capital or statutory rape" and reiterating that *Collins* indicates the same holding and offers no exception in cases where there may be a proper evidentiary basis to support the defense); Darden v. State, 798 So. 2d 632, 634 (Miss. Ct. App. 2001) (citing *Daniels* in a statutory sexual battery case as the basis for the "clear" law that mistake of age of the victim in such sex crimes is no defense).

pression analysis[33] and determination of the legislative intent behind statutory rape laws was based on the pre-1998 statutes.[34] In fact, this state of the law seems to be so accepted as "well settled" by Mississippi courts that the Mississippi appellate courts have only decided three cases involving the issue of reasonable mistake of age in statutory rape cases since 2001.[35]

Consider the following. When the issue of the availability of a mistake of age defense with proper evidentiary basis (which could also be called the "reasonable" mistake of age defense) arose in 2001 in *Todd*, in 2002 in *Sanders*, and in 2006 in *Phillipson*, as a result of what was ultimately deemed dicta from *Collins*,[36] no mention or consideration of the legislative intent of the revised statutory scheme was ever made.[37] Instead, both the Mississippi Supreme Court and the Mississippi Court of Appeals simply relied on the *Collins* decision's interpretation of legislative intent that had been founded on two statutes that have since been repealed and on a third statute that has since been substantially revised.[38] In fact, the *Collins* court itself, in its interpretation of the legislative intent behind the statutory rape laws at the time, referenced statutory language that, since the 1998 revisions, has now become completely irrelevant insofar as the former legal age of consent has been legislatively changed by the amended

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[33] *Collins*, 691 So. 2d at 922.

[34] *See supra* note 14 and accompanying text.

[35] *See supra* note 32. The only "mistake of age" cases decided in Mississippi's state appellate courts since 2001 have been *Sanders v. State*, 825 So. 2d 53 (Miss. Ct. App. 2002), *Farrish v. State*, 920 So. 2d 1066 (Miss. Ct. App. 2006), and *Phillipson v. State*, 943 So. 2d 670 (Miss. 2006).

[36] The arguments in *Todd*, *Sanders*, and *Phillipson* were based on a section of the *Collins* opinion that was later deemed dicta. *See Phillipson*, 943 So. 2d at 672; *Todd*, 806 So. 2d at 1096-97; *Sanders*, 825 So. 2d at 57. This dicta involved a recitation of the actual facts found in *Collins* which the defendant argued should have allowed him the use of the mistake of age defense, but which the court said indicated that Collins did not have a "reasonable" or "good faith" belief that the young girl was of legal age. *Collins*, 691 So. 2d at 924-25.

[37] *See Phillipson*, 943 So. 2d at 672; *Todd*, 806 So. 2d at 1096-97; *Sanders*, 825 So. 2d at 57.

[38] *See supra* note 37; *see also supra* notes 14, 17, 25 and accompanying text.

statute.[39]

Thus, the Mississippi courts have continuously failed for almost a decade to address and interpret the revised will of the state's legislators from 1998. Therefore, the judicial branch of Mississippi's government has ignored the will of the state's citizens who democratically elected those legislators and have continued to elect legislators who apparently support that version of the law, as it has not been substantively altered since.[40] More egregious is the fact that ever since Justice Kennedy's opinion in *Lawrence v. Texas* was handed down in 2003, Mississippi courts have failed to even address the issues that could arise in the context of Mississippi's strict liability criminal sexual offense laws, such as those criminalizing statutory rape as discussed here, and therefore the courts have placed those laws at an increased risk of someday being declared unconstitutional by the United States Supreme Court.[41]

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[39] *Collins*, 691 So. 2d at 923 ("The clear intent underlying the crime of statutory rape is that females under age eighteen are legally unable to consent to sexual relations with another."). The language of the current statute indicates that adults, for purposes of having the ability to consent legally to sexual relations that would otherwise fall under these types of sexual offense statutes, are those persons sixteen years of age or older. *See* MISS. CODE ANN. § 97-3-65(1)-(3) (2006).

[40] *See supra* notes 28, 29 and accompanying text.

[41] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003). Though the ultimate outcomes of *Todd*, *Sanders*, and *Phillipson* likely would not have changed, especially since the first two of those cases predated *Lawrence*, the Mississippi courts, in relying upon the *Collins* rationale, missed a golden opportunity to address and update the state's reasoning behind maintaining strict liability status couched in the pure language of the public welfare offense doctrine for these types of crimes. Such an update reflecting modernized reasoning but drawing the same ultimate conclusion could have placed the statutes on a stronger footing for the battle looming on the horizon and discussed further below involving liberty interests, substantive due process, notice, and evolving legal traditions and community standards, both national and local. If and when the issue of the unconstitutionality of these strict liability criminal statutes, which deny defendants reasonable affirmative defense options, is addressed by the courts of appeal and/or the United States Supreme Court, states, such as Wisconsin, whose courts have taken the opportunity to review legislative intent and to modernize their judicial reasoning to reflect modern concerns on issues such as prevention of teen pregnancy and enabling of proper psychological and social development of adolescents, may have

V. STRICT LIABILITY SEX: THE PUBLIC WELFARE OFFENSE DOCTRINE AND *LAWRENCE*

The history of statutory rape laws in America has been dotted over the years with commentary from various factions of society, including lawmakers, legal scholars, psychologists, sociologists, welfare workers, educators, prosecutors, and many others, all on some level subscribing to the belief that justice cannot be done in certain statutory rape cases unless a defense of reasonable mistake of age is available to at least some defendants.[42] Since *Lawrence*, there now exists an even more tenable argument that strict liability statutory rape laws are at least unfair and unjust and may actually be unconstitutional if they do not provide for some defendants to present an affirmative defense of reasonable mistake of age in otherwise consensual situations.[43]

One basis for this argument comes from an analysis of the public welfare offense doctrine that, either explicitly or implic-

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a stronger leg to stand on in light of *Lawrence* and its arguable removal of the notice to defendants that allows such strict liability criminal statutes even to exist. *See* Jadowski v. State, 680 N.W.2d 810 (Wis. 2004); *see also supra* note 15 and accompanying text. *See generally* Carpenter, *supra* note 3; Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005); Loewy, *supra* note 15; *Oberman*, *supra* note 10; Alice Susan Andre-Clark, Note, *Whither Statutory Rape Laws: Of* Michael M., *The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933 (1992). For further explanation of the tenuous position of strict liability status when no affirmative defenses are available for statutory rape defendants post-*Lawrence*, see the discussion in Parts V-VI.

[42] *See, e.g.*, Carpenter, *supra* note 3; Levine, *supra* note 41; Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965); Earle G. Prevost, *Statutory Rape: A Growing Liberalization*, 18 S.C. L. REV. 254 (1966).

[43] Much has been made about the inability for any sex involving minor females to be truly "consensual," whether it is legally considered consensual or not. This Article assumes that it is possible in some cases for minors, both male and female, under the legal age of consent to *actually* consent in the traditional sense to engaging in sexual relations with other minors or adults alike. For interesting commentary and further discussion of this topic, see Andre-Clark, *supra* note 41, and Oberman, *supra* note 10, at 177, which concludes that, since the goal of promoting young girls' sexual autonomy is a worthy one to be encouraged by the law, "the law cannot privilege consent obtained through coercion and a girl's naivete [sic]."

itly, has first provided the foundation for, and then continued to support the existence of, most strict liability criminal laws, including statutory rape laws, in American jurisdictions.[44] The public welfare offense doctrine itself is an exception to the general fundamental premise in criminal law that laws should only punish an actor when his or her actions are accompanied by a corresponding "guilty mind."[45] Succinctly put, under a public welfare offense strict liability statute, a prosecutor only needs to prove that a defendant committed an illegal act, regardless of that defendant's level, or even complete lack of, mental culpability.[46]

Because such statutes lend themselves to relatively simple prosecutions and easy convictions,[47] certain offenses have been held to be entirely outside the purview of any legislation attempting to make them strict liability offenses. For instance, in *Staples v. United States*,[48] the Supreme Court noted that "'penalties [imposed in public welfare offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation.'"[49] Based on that reasoning, the *Staples*

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[44] *See* Carpenter, *supra* note 3 and accompanying text. Pertinent to Mississippi, see the discussion of *Todd v. State*, 806 So. 2d 1086, 1097 (Miss. 2001), *supra* note 27 and accompanying text.

[45] Carpenter, *supra* note 3, at 322-25. Carpenter calls it a "narrowly defined exception." *Id.* at 322. *But see* John L. Diamond, *The Crisis in the Ideology of Crime*, 31 IND. L. REV. 291 (1998) (discussing the position that traditional strict liability crimes are not just isolated exceptions to a criminal system that otherwise requires a culpable *mens rea* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 242-49 (2d ed. 1986))).

[46] *See, e.g.*, Todd v. State, 806 So. 2d 1086, 1096 (Miss. 2001) (holding no error in granting a jury instruction propounded by the State which held Todd strictly liable for the criminal act of having sex with a partner under fourteen years of age).

[47] Carpenter asserts that the ease of conviction associated with the classification of a crime as a public welfare offense "has led to a legislative trend in the twentieth century to omit mens rea from a growing list of crimes." Carpenter, *supra* note 3, at 327.

[48] 511 U.S. 600 (1994).

[49] *Staples*, 511 U.S. at 617-18 (quoting Morissette v. United States, 342 U.S. 246, 256 (1952)). This reasoning is also consistent with the views espoused by Sayre, *supra* note 19, in his 1933 article on the subject of the public welfare offense doctrine.

Court reversed the defendant's conviction for felony possession of an unregistered machine gun.[50] The Court found it troubling that the conviction had been gained without the requirement that the prosecutors prove beyond a reasonable doubt that the defendant had at least some level of knowledge as to the illegality of his possession of what he thought was not an automatic machine gun of the type requiring registration.[51] The Court was also troubled by the fact that conviction under the statute carried with it the potential for a ten-year term of imprisonment,[52] a penalty decidedly out of line with the concept that only small punishments which carry little stigma and few if any long-term social consequences should be available when defendants are held strictly criminally liable for their actions.[53]

Other examples of strict liability criminal statutes that have been similarly struck down as rendering unfair and unjust results and being inconsistent with the fundamental nature of public welfare offenses include theft and conversion of government property,[54] unlawful possession of a firearm,[55]

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[50] *Staples*, 511 U.S. at 620.

[51] *Id.* at 602.

[52] The National Firearms Act, under which Staples was tried, "makes it a crime, punishable by up to 10 years in prison . . . for any person to possess a firearm that is not properly registered." *Id.* at 602-03 (citing 26 U.S.C. §§ 5861(d), 5871 (2000)).

[53] *Id.* at 603-04; *see also* Sayre, *supra* note 19.

[54] *See* Morissette v. United States, 342 U.S. 246, 270-71 (1952).

[55] *See Staples*, 511 U.S. at 600; *supra* notes 48-53 and accompanying text; *see also* State v. Anderson, 5 P.3d 1247 (Wash. 2000) (en banc). In *Anderson*, the Washington Supreme Court reversed a conviction by holding "knowledge" to be a required element of the offense of second degree unlawful possession of a firearm. *Anderson*, 5 P.3d at 1249. The court, however, commended the court of appeals' use of an eight-factor test to determine whether the legislature had created a strict liability crime. *Id.* at 1251. These eight factors came partly from the *Staples* decision and partly from a work by the noted criminal law scholars Wayne LaFave and Austin Scott. *Id.* at 1251 n.2. The factors are indicative of the criteria most jurisdictions consider when determining the propriety of making a crime a strict liability offense. *See* Sayre, *supra* note 19, at 72. The *Anderson*-approved factors are described in that case as follows:

> (1) . . . the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether

and, in some jurisdictions, statutory rape.[56] As previously alluded to, those jurisdictions, including Mississippi, that still refuse to allow reasonable mistake of age as a defense to a charge of statutory rape should take notice of the tenuous position of the public welfare offense doctrine as the support on which true strict liability statutory rape laws continue to attempt to rely.[57] Legislators and judicial officials in such jurisdictions should also be aware of the effect that the combination of the explicit holding of *Lawrence*, the logical legal conclusions that can be drawn therefrom, and the holdings of several other past Supreme Court decisions dealing with adults' private and consensual sexual practices might have if their statutory rape laws continue to be cast solely in the

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> the crime can be characterized as a 'public welfare offense' created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) . . . the harshness of the penalty[;] . . . (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, 'even at the cost of convicting innocent-minded and blameless people'; and (8) the number of prosecutions to be expected.

Anderson, 5 P.3d at 1251 (alteration in original). Sayre's criteria involve the character of the offense (does the criminalization of the deed intend to single out individual wrongdoers for punishment or correction, meaning *mens rea* should be required, or does it intend to be of a merely regulatory nature, meaning strict liability is acceptable) and the possible penalty for the offense (if imprisonment is possible, *mens rea* should be required). Sayre, *supra* note 19, at 72.

[56] *See, e.g.*, State v. Guest, 583 P.2d 836 (Alaska 1978). In holding that a defendant's honest and reasonable mistake of fact as to the victim's age is a defense to a charge of statutory rape, the court in *Guest* referred to its reasoning in a prior decision "that consciousness of wrongdoing is an essential element of penal liability." *Id.* at 838, 840 (citing Spiedel v. State, 460 P.2d 77 (Alaska 1969)). *Guest* also cited the early examples of what has now become a minority trend of states recognizing the defense of reasonable mistake of age either statutorily or judicially. *Id.* at 838 n.2 (citing statutes from Arkansas, Montana, and Washington, as well as the California case of People v. Hernandez, 393 P.2d 673 (Cal. 1964)). *But see contra* Commonwealth v. Robinson, 438 A.2d 964 (Pa. 1981), *infra* note 91 and accompanying text.

[57] *See supra* notes 6, 41 and accompanying text. Mississippi and similar jurisdictions represent the majority view in this country today. Carpenter, *supra* note 3, at 343.

molds of public welfare offenses and long-standing moral and historical traditions of protecting minor children's chastity and virtue.[58]

VI. NOTICE AND THE *LAWRENCE* LINE OF CASES

After Justice Kennedy's opinion in *Lawrence*, which followed a substantive due process analysis, the Supreme Court now formally recognizes a constitutionally protected liberty interest for adults to engage in consensual homosexual acts of sodomy.[59] Thus, yet another significant level of governmental regulation of private consensual sex acts between adults has now been constitutionally deleted.[60] The importance of this ever-decreasing governmental involvement in the regulation of private and consensual sexual activities between adults is that

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[58] Note that Mississippi was the last jurisdiction to remove from its statutory rape laws the availability of a defense based on the victim's promiscuity or lack of chastity. *See* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 318 n.28 (2003). As previously discussed, Mississippi's case law interpreting the legislative intent behind the criminal characterization of statutory rape reflects the longstanding historical traditions' reasoning that seems to be losing favor with courts of appeals and the current Supreme Court. *See, e.g.*, *supra* note 19 (highlighting the Court's reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002)). Also, Justice Scalia's opinion from *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had relied upon local community standards and longstanding traditions in upholding a Georgia sodomy statute, has now been explicitly overruled by Justice Kennedy's opinion from *Lawrence v. Texas*, 539 U.S. 558 (2003), which cited changing national trends and standards and found previously unrecognized liberty interests under a substantive due process analysis and struck down a Texas sodomy law as being unconstitutional. Further evidence that the modern Supreme Court is moving away from acceptance in its jurisprudence of long-standing local standards and historical traditions as rational bases to support certain types of legislation can be found in cases such as *Atkins*, 536 U.S. 304, in which the Court abolished the death penalty for mentally retarded defendants, and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court abolished the death penalty for juveniles in this country upon reliance on the Eighth and Fourteenth Amendments to the United States Constitution, evolving standards of decency in a maturing society, and even the overwhelming weight of international opinion.

[59] *Lawrence*, 539 U.S. at 578 ("[T]he present case does not involve minors. . . . [It] does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.").

[60] *See infra* notes 69-79 and accompanying text.

such lessening of official intrusion has greatly reduced the likelihood that potential defendants will have proper notice that their behavior is subject to governmental regulation.[61]

Such notice is a well-established, necessary requirement for all criminal statutes, but especially for strict liability criminal statutes to pass constitutional muster generally under a basic due process analysis.[62] Indeed, in *Lambert v. California*, which upheld the general permissibility of a strict liability criminal statute for the minor crime of failing to register as a felon upon entering California, the Supreme Court held the statute at issue unconstitutional as to that defendant on grounds that she had been denied due process of law because of lack of notice.[63]

Accordingly, due process and notice become even more necessary requirements for statutes to be found constitutional, either on their face or as to particular defendants, when a strict liability felony statutory rape law subjects a defendant to severe penalties that can affect life, liberty, and an individual's fundamental rights, both as an American citizen and as a human generally.[64] Such penalties imposed under various statutory rape laws include imprisonment (varying in degree from time served up to life),[65] requirement of registration as a sex offender,[66] disenfranchisement,[67] harsh social stigmatization, and other long-term, even possibly lifelong, negative consequences.[68]

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[61] *See* Carpenter, *supra* note 3, at 364-67 (explaining the impact of *Lawrence* on strict liability).

[62] "Fundamental to the constitutionality of the [strict liability criminal] ordinance in question was whether defendant had notice that her behavior could be criminally proscribed." Carpenter, *supra* note 3, at 361 (citing Lambert v. California, 355 U.S. 225, 227 (1957)).

[63] *Lambert*, 355 U.S. at 229-30 ("Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.").

[64] *See generally* Sayre, *supra* note 19.

[65] *See, e.g.*, MISS. CODE ANN. § 97-3-65(3)(a)-(c) (2006).

[66] *See, e.g.*, MISS. CODE ANN. § 45-33-23(g)(ii) (Supp. 2006).

[67] 2001 Op. Miss. Att'y Gen. 278, 2001 WL 668748 (2001) (stating that based on the reading of Section 241 of the Mississippi Constitution of 1890, the conviction of either forcible or statutory rape results in disenfranchisement).

[68] For example, consider the inability of a convicted felon to possess lawfully a

So how exactly has the notice component that has provided the necessary due process to defendants and supported statutory rape's status as a strict liability public welfare offense eroded over time? Beginning with cases such as *Griswold v. Connecticut*,[69] which in 1965 reduced permissible governmental regulation of contraception in the context of marriage, and continuing through to *Lawrence v. Texas*,[70] which in 2003 legalized consensual adult homosexual sodomy, the trend in modern era, with few exceptions,[71] has been for the Supreme Court continually to reduce governmental involvement in, regulation of, and intrusion into consenting adults' private sexual lives.

In *Griswold*, the Court found that a Connecticut law forbidding the use of contraceptives of any kind by any person unconstitutionally intruded upon a right of marital privacy.[72] In *Eisenstadt v. Baird*, the Court found that a right of privacy existed for all individuals, whether married or single, to be free from unwarranted governmental intrusion into the important life decision about whether or not to have a child.[73] The *Eisenstadt* decision found that right in assessing the validity of a Massachusetts law that made distribution of any contraceptive devices illegal, unless they were distributed to married persons.[74] Shortly thereafter, the Court decided *Roe v.*

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firearm and other "weapons." *See* MISS. CODE ANN. § 97-37-5(1) (2006) ("It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the U.S. Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.").

[69] 381 U.S. 479 (1965).

[70] 539 U.S. 558 (2003).

[71] *E.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[72] 381 U.S. at 480-85.

[73] 405 U.S. 438, 453 (1972).

[74] *Id.* at 440. The law was invalidated because it violated the Equal Protection Clause. *Id.* at 454-55.

Wade,[75] the famous decision wherein the Court first removed significant legal obstacles from the paths of women seeking abortions, an obvious example of removal of governmental involvement in, regulation of, and intrusion into individuals' sexual lives and choices.[76] The case of *Carey v. Population Services International*,[77] even lessened governmental involvement in the regulation of minors' sexual lives when the Court declared a law prohibiting distribution of contraceptives to persons under age sixteen unconstitutional.[78] Similar outcomes finding personal rights and liberty interests in sex-related arenas, and allowing less, rather than more, governmental intrusion into the realm of private sexual activities continued, with few aberrations,[79] all the way through *Lawrence* in 2003. Thus, the Supreme Court's jurisprudence has worked over nearly half a century to effectively eliminate governmental involvement in consenting adults' private sexual lives.

Although some statutes allowing and even requiring governmental involvement in, regulation of, and general intrusion into consenting adults' private sexual activities still exist in spite of the *Lawrence* holding,[80] those so-called fornication

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[75] 410 U.S. 113 (1973).

[76] *Id.* at 153-56.

[77] 431 U.S. 678 (1977).

[78] *Id.* at 681-82 (affirming the New York law's "unconstitutional[ity] in its entirety under the First and Fourteenth Amendments of the Federal Constitution").

[79] *E.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[80] Fourteen states, including Mississippi, currently outlaw fornication. Loewy, *supra* note 15, at 78 n.8 (citing FLA. STAT. ANN. § 798.02 (West 2004); IDAHO CODE § 18-6603 (Michie 2004); 720 ILL. COMP. STAT. ANN. 5/11-8 (West 2004); MASS. GEN. LAWS ANN. ch. 272 § 18 (West 2004); MICH. COMP. LAWS ANN. § 750.335 (West 2004); MINN. STAT. ANN. § 609.34 (West 2004); MISS. CODE ANN. § 97-29-1 (2004); N.C. GEN. STAT. § 14-186 (2004); N.D. CENT. CODE § 12.1-20-10 (2004); OKLA. STAT. ANN. tit. 21, § 1120 (West 2004); S.C. CODE ANN. § 16-15-60 (Law Co-op. 2003); UTAH CODE ANN. § 76-7-104 (2004); VA. CODE ANN. § 18.2-344 to 12-345 (Michie 2004); W. VA. CODE ANN. § 61-8-3 (Michie 2004)). "The federal government also bans fornication." *Id.* at 78 n.9 (citing 18 U.S.C. § 2421 (2004)). Since the publication of the Loewy article, however, the legislatures in Massachusetts and North Dakota have proposed legislation that would repeal their fornica-

statutes would not likely withstand constitutional scrutiny after *Lawrence*.[81] Indeed, it would be a far stretch of the imagination to believe that any court, even the most politically conservative or religious-minded court in the nation, would take seriously any argument that heterosexual sex, with its fundamental procreative value, stands on a weaker constitutional footing in terms of being an individual liberty interest than does homosexual sex, which has no procreative value whatsoever.[82] Although *Lawrence* did not address heterosexual fornication statutes, it is highly unlikely that any court would still uphold such statutes after *Lawrence* has legalized "homosexual fornication,"[83] a much less politically popular cause than one would imagine heterosexual fornication to be.

Also, while heterosexual fornication statutes remain on the books in some states,[84] because of the potential for (and actual evidence of) selective enforcement of sex laws generally and abusive or discriminatory prosecutions,[85] these statutes should ultimately be struck down, as the sodomy laws were based partly on those practices as described in *Lawrence*.[86] If nothing else, there now exists, according to the law as announced by the Supreme Court, a seemingly broad and general liberty interest in sexual privacy for consenting adults found through a substantive due process analysis.[87] There-

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tion statutes, and Va. Code Ann. § 18.2-344 was declared unconstitutional in *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005), a holding which was recognized in *Singson v. Commonwealth*, 621 S.E.2d 682 (Va. Ct. App. 2005). Virginia's statute governing "Lewd & Lascivious Cohabitation," however, is still in effect. VA. CODE ANN. § 18.2-345.

[81] *See generally* Loewy, *supra* note 15.

[82] *See* Loewy, *supra* note 15, at 79 n.17.

[83] Since homosexuals generally cannot legally marry, and since "fornication" by definition involves "[v]oluntary sexual intercourse between two unmarried persons," BLACK'S LAW DICTIONARY 679 (8th ed. 2004), the term "homosexual fornication" as used here is meant to indicate a legal parallel to the variety of sexual practices technically outlawed by the few remaining fornication statutes which regulate unmarried heterosexuals.

[84] *See supra* note 80.

[85] *See* Sutherland, *supra* note 58, at 322-26.

[86] Lawrence v. Texas, 539 U.S. 558, 572-73 (2003).

[87] *Id.* at 561-79.

fore, one can be fairly confident in concluding that any remaining traditional fornication statutes, if challenged, would also be deemed unconstitutional.[88]

Thus, with respect to an adult charged with statutory rape who reasonably and honestly held a mistaken belief that his or her partner was at least of an age to consent legally to sexual relations with him or her, for the past five decades, every time the Supreme Court has decreased governmental regulation of adults' private consensual sexual lives, the constitutionally mandated notice that preserves due process by informing potential defendants that their private and consensual sexual relations with other adults could be interfered with by the government has been eroded away so as to become essentially nonexistent.[89] Through this line of judicial reasoning, the Supreme Court has effectively removed nearly all governmental involvement in, regulation of, and intrusion into adults' private and consensual sexual activities. Therefore, the notice component no longer exists as is required both by the concept of due process as a constitutional necessity and as a fundamental tenet of the public welfare offense doctrine to maintain statutory rape in the form of a strict liability crime with no mistake of age defense available.

VII. Options Regarding Mental Culpability

Particularly after *Lawrence* and its likely consequences for the few remaining fornication statutes still on the books in various jurisdictions in this country,[90] the gradual erosion of notice that took roughly half a century to complete has now reached the point at which a statutory rape defendant's "guilty" or "morally culpable" state of mind cannot be inferred or assumed simply from the fact that he or she was engaging in sexual relations.[91] To remedy this problem regarding the

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[88] *See* Loewy, *supra* note 15, at 77.

[89] *See supra* notes 69-79 and accompanying text.

[90] *See supra* notes 84-88 and accompanying text.

[91] This has been a frequently cited rationalization for requiring no showing of mental culpability and for not allowing an affirmative defense to negate the auto-

legislative intent underlying some current statutory rape laws, lawmakers should consider creating a requirement that an element of the crime be that the defendant was at the very least negligent in failing to ascertain the age of his or her sexual partner.

Since the penalties for statutory rape are so severe in many states, [92]and arguably are still fairly severe in Mississippi for some classes of defendants even after the 1998 revisions,[93] it would really be preferable for some level of mental culpability beyond mere negligence to be shown before a prosecutor can win a conviction. Where states are reluctant to explicitly attach a particular mental state, such as "negligence," "recklessness," or "knowledge," to the statute, courts should interpret the legislative intent to include at least a *mens rea* of negligence in order to maximize the potential for justice for all categories of defendants under the law.[94] Alter-

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matic presumption of some level of mental culpability. *See, e.g.*, Commonwealth v. Robinson, 438 A.2d 964 (Pa. 1981). The Supreme Court of Pennsylvania, in a statutory rape case predating many of the U.S. Supreme Court's most significant sexual privacy cases, held that it was not a violation of due process for the legislature to require that "one eighteen years of age or older who engages in sexual intercourse with a child below fourteen years of age does so at his own peril." *Id.* at 966. The court then denied the defendant use of a defense as to mistake or misrepresentation of the child's age. *Id.* Interestingly, this case also cited *Lambert v. California*, 355 U.S. 225 (1957), and noted that "due process considerations impose some limitations on the absence of a knowledge requirement from the definition of a criminal offense." *Id.* at 966-67. In light of the drastic changes made to the legal landscape since 1981 surrounding strict liability criminal offenses and sexual privacy, this citation should be reconsidered. The court in *Robinson*, in refusing to invalidate the law as irrational, also relied heavily upon trends from other jurisdictions and upon the Pennsylvania "legislature's determination to bar the defense . . . based on a long-standing and widely accepted principle of law and public policy." *Id.* at 967 n.5. Again, see *supra* note 58 and accompanying text, for a summary of how the Supreme Court's analysis on such subjects has changed since 1981, making it likely that the *Robinson* court's rationale for denying the mistake of age defense would fail scrutiny by the current Court.

[92] This Article has provided numerous examples of the unjust sentences and other consequences to defendants meted out in cases from various states.

[93] *See* MISS. CODE ANN. § 97-3-65 (2006).

[94] The Alaska Supreme Court applied such an interpretation in *State v. Guest*, 583 P.2d 836 (Alaska 1978), prior to that state's statutory adoption of the affirmative defense. *See* ALASKA STAT. § 11.41.445 (2006); *see supra* note 56 and accompanying text; *see infra* note 102 and accompanying text.

natively, as the Model Penal Code suggests, instead of making knowledge as to age an element of the crime and completely taking away its strict liability status with respect to all defendants, reluctant legislatures could instead legislatively mandate to certain defendants the availability of an affirmative defense, so they might show reasonable mistake of age by a preponderance of the evidence.[95]

One should, however, at all times remember that in no way is this Article attempting to argue that the changes in the constitutional landscape surrounding sexual legislation since *Lawrence* should permit any weakening of the laws regarding the "typical" case of statutory rape or other sexual offenses.[96] Such cases involving an adult who engaged in sexual activities with a partner he or she actually knew or reasonably should have known had not yet reached the legal age of consent would not be affected by the suggested changes to the current laws that this Article proffers as necessary to ensure justice since governmental interference in consenting adults' private sexual affairs has virtually disappeared in recent years.[97]

After *Lawrence*, governmental interference in consenting adults' private sexual activities can legitimately be considered a thing of the past. Because of a legal landscape now completely devoid of government involvement in, regulation of, and intrusion into such activities, statutory rape laws that do not allow a reasonable mistake of age defense no longer meet the *Morissette*[98] exhortation that strict liability public welfare offenses should only exist in areas of the law that address extremely dangerous and highly regulated behaviors and ma-

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[95] MODEL PENAL CODE § 213.6(1) (1980); *see also infra* note 100 and accompanying text. Alaska's Legislature chose this option for its statute after its Supreme Court in *State v. Guest* read an implied *mens rea* element into their prior statute. *See supra* notes 56, 93 and accompanying text; *see also infra* note 102 and accompanying text.

[96] *See supra* note 5 and accompanying text (describing *Foley v. State*, 914 So. 2d 677 (Miss. 2005), an example of the "typical" statutory rape case).

[97] Justice Kennedy makes it abundantly clear in *Lawrence* that his majority opinion only applies to consenting adults. Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see also supra* note 59 and accompanying text.

[98] Morissette v. United States, 342 U.S. 246 (1952).

terials.[99] When potential defendants can no longer be assumed to have notice that they are participating in an activity that could result in criminal punishment,[100] not only has a component necessary for the law to withstand scrutiny under a due process analysis been removed, but the public welfare offense basis for strict liability statutory rape laws has disappeared as well.

VIII. A Model Constitutional Statutory Rape Law

Mississippi's case law concerning the mistake of age defense for statutory rape and similarly situated sexual offenses recognizes that there is an evolving trend towards allowing the defense as shown by the statutes of other states and by the Model Penal Code's suggested statute.[101] The Model Penal Code suggests the following as an example of a clause to be included in a fair, just, and constitutional statute addressing the mistake of age defense to a charge of statutory rape:

> Mistake as to Age. Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.[102]

Alaska is also often cited as a state whose statute is fair, just, constitutional, and operating to ensure justice for all parties involved in a statutory rape prosecution.[103] The pertinent provision in Alaska's criminal code reads as follows:

> (b) In a prosecution under AS 11.41.410 – 11.41.440, when-

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[99] *Id. See generally* Carpenter, *supra* note 3.

[100] *See supra* note 91 (emphasizing the problems with the reasoning in cases such as *Commonwealth v. Robinson*, 438 A.2d 964 (Pa. 1981)).

[101] *See* Collins v. State, 691 So. 2d 918, 922 (Miss. 1997).

[102] Model Penal Code § 213.6(1) (1980).

[103] *See* Carpenter, *supra* note 3, at 341 n.157, 343 n.168.

> ever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant
> (1) reasonably believed the victim to be that age or older; and
> (2) undertook reasonable measures to verify that the victim was that age or older.[104]

In Mississippi, considering both the judicially stated legislative intent behind the pre-1998 statutory rape laws and the perceived likely intentions of current and future legislators,[105] the following amendments could be made to the current statutory rape laws to bring them into line with the laws of those states whose statutes, based on the arguments propounded in this Article, are the most fair, just, and undoubtedly constitutional in the United States. These suggested amendments would also operate to ensure that no injustices would be likely to be wrought upon defendants who are completely and honestly devoid of any mental culpability for their actions.

Without further ado, I propose that Mississippi Code Annotated, section 97-3-65 be amended as follows (amendments in bold-faced type and deletions italicized):

> Statutory rape; *enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.*[106]
> (1) The crime of statutory rape is committed when:
> (a) Any person seventeen (17) years of age or older has sexual intercourse with a **person**[107] who:
> (i) Is at least fourteen (14) but under sixteen (16) years of age;
> (ii) Is thirty-six (36) or more months younger than the person; and

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[104] ALASKA STAT. § 11.41.445 (2006).

[105] *See supra* notes 28, 29 and accompanying text.

[106] Considering the focus statutory rape by itself has received in this Article, it follows that the crime should be clearly written as an individual offense and not confused by numerous subsections relating to crimes of a different nature.

[107] Referring to the alleged victim as "child" could taint jurors' opinions of the defendant, who had no intention of engaging in sexual activity with a "child" in the commonly used sense of the word.

(iii) Is not the person's spouse; or
(b) A person of any age has sexual intercourse with **a person** who:
(i) Is under the age of fourteen (14) years;
(ii) Is twenty-four (24) or more months younger than the person; and
(iii) Is not the person's spouse.
(2) Neither the **underaged party**'s consent nor the **underaged party**'s[108] lack of chastity is a defense to a charge of statutory rape.
(3) The defendant has established an affirmative defense if, by a preponderance of the evidence, the defendant proves that, at the time of the alleged offense, the defendant held an honest and reasonable belief that the underaged party was actually of an age to consent legally under the provisions of this statute;
(a) Provided that the defendant undertook reasonable measures to ascertain the underaged party's age; and
(b) Provided that the actual age of the underaged party is greater than ten (10) years old.
(4) Upon conviction for statutory rape, the defendant shall be sentenced as follows:
(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment of not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($5,000.00), or both;
(b) If twenty-one (21) years of age or older and convicted under paragraph (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;
(c) If eighteen (18) years of age or older and convicted under paragraph (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.
(d) If thirteen (13) years of age or older but under eighteen

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[108] I would substitute "underaged party" for "victim" for reasons similar to those expressed above. *See supra* note 107.

(18) years of age and convicted under paragraph (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.[109]

IX. The Role of Prosecutors

Even outside the constitutional context, the prosecutor's special role as "a minister of justice"[110] in society demands that in certain cases extenuating circumstances, such as a statutory rape defendant's reasonable mistake of age, be taken into account. The screening stage, the charging process, the plea bargaining, the trial, and the appellate phases all offer opportunities for individual prosecutors to see to it that justice is done (or maybe, more importantly, that no injustice is done) for all those involved, including the defendant, the victim and his or her family, society at large, and the legal and justice systems as a whole.

Unless and until the Mississippi legislature amends the statute as suggested above, or the courts judicially permit the reasonable mistake of age defense to be offered by these defendants, prosecutors should strive for the optimization of justice by exercising their professionally allowed (and, one would hope, ethically and morally demanded) discretion when deciding whether or how to charge a case, whether to offer a plea agreement, and, if offering such an agreement, what kind of sentence or punishment to try to impose upon the "guilty" party.

The Mississippi Rules of Professional Conduct actually demand that prosecutors engage in such discretionary behavior, stating, *inter alia*, "The prosecutor in a criminal case shall . . .

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[109] As the sentencing mandates reflect the legislative will of the people of Mississippi, and as they are fair as long as no conviction would be won unless a jury rejected as a finding of fact the evidence that the defendant held an honestly and reasonably mistaken belief as to his or her partner's actual age, I would not presume to suggest particular revisions to the prescribed sentences, as I do not have any facts to support my feelings on the subject or any sort of political currency with which to legitimize my opinion.

[110] Miss. Rules of Prof'l Conduct R. 3.8 cmt. (2005) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[111] In light of this rule, especially if the statute were to be amended to reflect the changes suggested in Part VIII of this Article, prosecutors could conceivably never be required to charge defendants with solid evidence of an honestly held and reasonably mistaken belief as to their "victim's" age. At all times, however, prosecutors must remain vigilant as to their broad and generally stated duties to "maintain[] the integrity of the profession," as further defined in Rule 8.4 of the Mississippi Rules of Professional Conduct.[112]

Prosecutors must also not forget to take account of the victims' rights, as Mississippi's statutes and proposed legislative enactments clearly evidence a general intent to achieve a fair and just balance between the rights and special needs of victims and the criminal defendants charged with victimizing them.[113]

Additionally, prosecutors are probably acutely aware that District Attorneys serve as elected officials at the will of the people. Therefore, there can often be intense political pressure placed on them to appease certain factions of the population, such as law enforcement officers, victims' rights advocacy groups, or even concerned parents of the teenage girls who are perceived to be in great danger if sex offenders of any kind, including merely "statutory" rapists, are allowed to live freely

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[111] MISS. RULES OF PROF'L CONDUCT R. 3.8(a) (2005).

[112] MISS. RULES OF PROF'L CONDUCT R. 8.4 (2005) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.").

[113] *See* MISS. CONST., art. III, §§ 26-26A; MISS. CODE ANN. §§ 99-36-1, -37-1, -38-1, -41-1, -43-1 (2006) (setting forth the Victim Assistance Coordinator Acts, Restitution to Victims of Crime, Mississippi Crime Victims' Escrow Account, Mississippi Crime Victims' Compensation, and Mississippi Crime Victims' Bill of Rights, respectively); *see also supra* notes 28, 29 and accompanying text.

and unchecked in their communities.

As a result of the pressures on elected District Attorneys, the subordinate prosecutors in their offices may be strongly encouraged or even required to prosecute to the fullest extent of the law all sex crimes, crimes against minors, and any crimes that garner media attention. It is likely that no District Attorney's office wants to be considered "soft on crime," especially for crimes defined under Chapters 3 or 5 of Title 97 of the Mississippi Code, those broadly categorized as and termed "Crimes Against The Person" and "Offenses Affecting Children," respectively.[114] For these reasons, the exercise of prosecutorial discretion without the support of a legislatively approved statute or judicially approved case law in statutory rape cases can be risky business for prosecutors seeking to optimize justice and minimize injustice, all the while trying to protect and keep their own jobs.

On the other side of that coin, of course, there may be prosecutors who feel ethically or professionally bound to follow the statute to the letter and not freely exercise their powers of prosecutorial discretion when the situation would permit or even seem to demand it. Whether their hesitance arises because of pressure from their superiors or communities, or whether it is borne out of their individual ethical concerns and personal sense of morality, just as the undercharging or "lenient" prosecutor could be risking his or her job by being considered by the public to be "soft on crime," the overzealous, hard-charging prosecutor may be viewed as unreasonable, unjust, and unwilling to compromise. Either way, when statutory rape cases arise wherein the "offender" and "victim" merely engaged in consensual sexual activity, and wherein the "offender" was reasonably mistaken as to the actual age of his or her partner, prosecutors are currently stuck between a rock (the laws) and a hard place (public opinion) in deciding whether to follow the letter of the law or to exercise their discretion in the name of justice.

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[114] *See* MISS. CODE ANN. §§ 97-3-1 to -117, 97-5-1 to -42 (2006).

X. Conclusion

To ameliorate the vagaries of the situation described in this Article, Mississippi lawmakers (and lawmakers in other jurisdictions with similarly flawed and unjust statutory schemes or case law) should seek to amend legislatively the true strict liability statutory rape laws to reflect, at the very least, the availability of an affirmative defense of reasonable mistake of age when evidence suggests that the defendant honestly and reasonably believed he or she was conducting himself or herself within the boundaries of a constitutional "safety zone" surrounding private consensual sexual activities engaged in with another legal adult. Such revision would remove the pressure from prosecutors, judges, and juries, who might otherwise feel troubled by what they see as their civic duty to charge, convict, and sentence morally blameless "offenders." Revision would also allow Mississippi's historically and continually maligned legal system to join, for once, a progressive minority of jurisdictions in bucking an outdated and unjust legal tradition that has the potential to place a great burden of the risk of facing harsh injustice upon only a small number of individuals.

The tradition of maintaining true strict liability with no exceptions for all defendants charged with serious felonies is fundamentally unjust. Because of its broad denial of due process since the completion of the erosion of notice after *Lawrence*, and because of its potential to wreak grave injustices and harsh long-term consequences upon innocent-minded individuals through misguided application of the public welfare offense doctrine, Mississippi's current scheme for prosecuting statutory rape is both legally untenable and socially unacceptable. While the will of many or most Mississippians may understandably be to punish severely the morally blameworthy sexual offenders in their state and local communities,[115] it should not be assumed that any changes favoring defendants, especially morally blameless ones, would be unattainable due

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[115] *See supra* notes 28, 29, 112 and accompanying text.

to a lack of political currency. Where statutory rape is concerned, the time has come for Mississippi and its citizens and policymakers to step forward together and join in support of the noble cause of preventing injustice for any defendants, no matter how few in number or seemingly insignificant as individuals they may be. In doing so, Mississippi can hope to gain in return an increase in respect for the state's legal system from all who will recognize its honest commitment to the fundamental American values of fairness and justice for all.

BOOK REVIEWS

MISSISSIPPI WORKERS' COMPENSATION: MISSISSIPPI PRACTICE SERIES

By: John R. Bradley and Linda A. Thompson
Thomson/West, 2006

John Griffin Jones[*]

Theory and practice. History and purpose. Life-altering workplace injury and recovery. Profound disability and reha-

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[*] B.A., 1977; J.D. 1985, University of Mississippi. Law clerk for U.S. District Judge Tom S. Lee, 1985-1986; associate Cupit & Maxey, 1986-1989; partner, Cupit, Jones & Fairbank, 1989-1993; solo or two-person practice, 1993-2001; senior partner, Jones Funderburg, Sessums, Peterson & Lee, PLLC, 2001-present. American Board of Trial Advocacy, associate, 2006-present; "A/V" rating, Martindale-Hubble, 1998; *The Best Lawyers in America*, 1996-present (workers' compensation); past chairman, Administrative Law and Worker's Compensation section, Mississippi Bar Assoc. (1999-2000); recipient, 2d Biannual Robert M. Carpenter, Esq. Award for "contributions of clarity, competence and compassion in the practice of law," 2003; admitted, U.S. Supreme Court, 1992; author, some fifty articles on worker's compensation law and related seminar topics, 1987-present; *Mississippi Writers Talking, Vols. I & II*, University Press of Mississippi (1982 & 1983).

bilitation. Risk-spreading and bull-headed conservatism. Employers and workers. Doctors and lawyers. Actions and consequences. Right and wrong. It's all in Mississippi compensation law. Now it's all in one superior volume.

In *Mississippi Workers' Compensation*, a separate volume in West's *Mississippi Practice Series*, a perfect combination of two minds and two hearts cover workers' compensation law from top to bottom, length to width. It addresses is the body of statutory and common law that has the most direct impact outside the criminal context on the lives of the most Mississippians—over 13,000 lost-time injuries were *reported* in 2005; no telling how many went unreported for reasons. It is immensely readable, endlessly useful, and an object lesson in the history and the law's attempt to accommodate the collision of capitalism and class, which was very nearly the story of the twentieth Century. Workers' compensation has always been about more than money and medical benefits. At its origin and at its best, the compensation system shows how the legislative, executive, and judicial branches once combined to address one of the more dehumanizing products of the Industrial Revolution—injury and death on the workplace-and mandated essential fairness for the lame and halt, the lowly claimant, the forever powerless. Nothing more or less is at stake in the compensation system, and the authors address each issue against this backdrop. They also demonstrate that compensation law cannot be understood and fairly applied outside of its unique context and ask whether some of the Mississippi compensation decisions in the new millennium can be squared with anything that went before.

The Honorable Linda A. Thompson has been an Administrative Judge and recognized authority on the Mississippi Workers' Compensation Act (the Act)[1] since the Reagan Administration. She brings to the work the practical and rubber-to-road realities of compensation law and practice, as seen through eyes which have seen it all. Professor John Robin Bradley has taught compensation law at the University of

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[1] MISS. CODE ANN. §§ 71-3-1 et seq. (2006) (the Act).

Mississippi School of Law since Lyndon Johnson's Administration (he does not like to admit the date . . . 1966). Simply put, he is the "guru" of compensation law in Mississippi, the most prolific and respected author on the Act and its judicial construction over the past generation (his work is frequently cited by the appellate courts in Mississippi), and by overwhelming consensus *the* oracular authority on all things compensable. On issues involving the intent, purpose, and spirit of the Act and the "whys" of compensation law in general, Professor Bradley is nothing more or less than the keeper of the flame. These two authors offer the perfect balance of practical experience with the theoretical foundations of the remedial, social, and worker-centric legislation that is the Act, with neither trumping the other. And because of what each brings to the whole, Judge Thompson and Professor Bradley have produced the most thorough yet usefully annotated and indexed practice-and-procedure volume available on *any* area of Mississippi law. The volume is now, and will be for the remainder of the reader's practice or career, *the* essential go-to source for Mississippi compensation law and all other areas of the common law touched by it. Besides the Act itself, and a dozen or so of the foundational decisions of the Mississippi Supreme Court, nothing else is even relevant, or needed.

And this is no little feat. The Act has always been unique, if not anomalous, in the history of Mississippi law since it was belatedly adopted by the Mississippi Legislature in 1948. As the volume explains, the compensation system was "radical" for its time precisely because it existed to relieve, in part, the wretched economic distress of workers and their families following workplace injury or death. Specifically, the Act responded to the ineffectiveness of the tort system in meeting the needs of the injured worker (concurrently smoothing the highs and lows encountered by employers defending negligence and other tort claims brought by injured employees), the very real friction that still is created between employers and employees in tort litigation, and the absolute need for a "swift and certain" recovery process in which fault concepts were jettisoned. The idea was and is to ensure that the system be

self-effectuating so that lawyer involvement would be the rare exception. It was, and remains in theory, a *voluntary* payment system. Elsewhere the compensation concept arose just as tort law was beginning to address similar phenomena using the same justification: Which party is in the best position to absorb the costs of the injury or death and spread it to as many people as possible? Although this core concept has disappeared from Mississippi compensation adjudication over the past fifteen-plus years, in truth compensation law was first to fully embrace risk-spreading as a worthy goal of the law. A few years later, what became known as products liability law drew from the same well.

But in the Magnolia State, the notion that the costs of employment injuries should be borne by the work project or enterprise (that is, the people who profited from the worker's labor), which could then pass the costs of insuring against those injuries to the general public through adjustment of the costs of goods and services, was without precedent. It was as foreign as socialism. Much of what compensation law is intended to address is still foreign to many Mississippians, and its leveling effect, like that of tort law, has been lost in the tempest of tort reform and lawyer bashing. But because of the national trend and Mississippi's experience with the tort remedy for workplace injuries, Mississippi became by far the last state in the union to adopt a compensation system. Sadly, the Act remains the only legislation extant in Mississippi that has as its express purpose and ultimate goal protecting the interests of the worker. As Judge Thompson and Professor Bradley point out with admirable subtlety, the compensation system makes no sense and cannot be effectively administered to produce coherent results in litigation without taking the first step, or leap, from this place. For if compensation is approached from a perspective uninformed by this history and the humanitarian goals of the law, or from a bottom-line business focus, the conflict in case results are as irreconcilable as they are inevitable. Wrong answers often come from wrong questions.

As is always true in applying any law to any set of facts,

context is critical. The history of administration and application of the Act in Mississippi is an object lesson in context. After early fitfulness, the Mississippi Supreme Court gradually got a better feel for the "bargain" at the heart of all compensation systems: The employer gives up fault defenses in exchange for tort immunity and a cap on liability he can then insure; the employee gives up a complete remedy at law in exchange for swift but certain no-fault recovery allowing him to subsist until he is physically able to return to wage-earning. The case decisions began to embrace this touchstone theory, and as they did the reach of the Act expanded. As recovery became easier, immunity was likewise extended—even to "up the line" contractors on any work project regardless of which employer paid compensation. In the early 1980s, compensation law began to draw serious exposition by the Court that lit the path to recovery like landing lights, with the Court embracing evidentiary presumptions and articulating rules that would apply across the board. The Court simultaneously acknowledged that the chief promise of the Act is and always has been its medical remedies. But on the money, this clarity allowed for private resolution of disputed cases through settlement. Primarily through the provocative narrative opinions of former Mississippi Supreme Court Justice James L. Robertson (Professor Bradley's friend and colleague on the faculty at the University of Mississippi School of Law, now the husband of Judge Thompson), the puzzle was assembled in such a way that what Robertson aptly called "the big picture" became as important as any discrete compensation issue before the Court. The "big picture" became an integral part of the resolution of every case, because decisions on isolated pieces of the puzzle made sense only if they were put in the right place. The effect was not only consistency and coherence in our compensation law but an atmosphere where results were easier to predict. The employers/carriers started paying more "voluntary" benefits, compensation lawyers settled cases, and the Act worked on the ground when it was needed most.

It was a long and honorable progression. Among the true gifts of this volume is its assimilation of compensation law

and its presentation in the proper context. Whether the reader wants to scratch the surface or to go deeper, it is clear that what Judge Thompson and Professor Bradley have in fact produced is the definitive source for locating, and then understanding, the law controlling resolution of workers' compensation cases in Mississippi. It is one-stop shopping. The reader finds not only the law but *why* the law is what it is. For the practitioner faced with a new or forgotten issue, the law is as close as the volume's excellent index and table of contents and cases, with each section containing thorough discussion of every case in which the issue was addressed. The footnotes are the most useful ever contained in a volume on Mississippi or any other law. For example, if the practitioner (or the adjuster, safety director, case management nurse, judge, etc.) wants to determine how much is due in permanent disability benefits for a twenty-eight percent loss of the worker's left thumb, the answer is provided in one easy-to-follow paragraph; further, the paragraph will inform the reader that the calculation is not the only question that should be asked. Judge Thompson's extremely useful practice and procedure tips tell the reader what to do when the calculation is made, including the most workable translation of the technical requirements and positive obligations of the statute and general and procedural rules of the Mississippi Workers' Compensation Commission that can be found. Laying aside hyperbole, these authors have produced here what very few have even attempted and others have failed at miserably: they have written the "Bible" on the subject of the law to which they have committed themselves.

But like the Holy Bible and some other great books, it is in part an exhortation. It addresses in context vital areas of compensation law that have come under attack, or have been massively misunderstood, in the past few years. In 2002, the Mississippi Supreme Court overturned 45 years of case law interpreting the test for proving loss of industrial use of a "scheduled" member under the compensation schedule's built-in and quite purposeful limitations on recovery. Twice the Court injected the definition of "disability" applicable to claims

for the full 450 weeks of benefits, including proof of loss of wage-earning capacity in "other" employment, into what had previous been a "streamlined, not tailored [to the facts of each individual case]" analysis that encouraged voluntary payment and settlement. Judge Thompson discusses the furor over the issue of the employers/carrier's right to engage in *ex parte* communication with a claimant's treating physician(s) in a separate and exceedingly thorough section that is just an example of the overall usefulness of this treatise. The changing law on tort immunity, including actions against employers or carriers for "bad faith" denials or delays in payment of benefits, is assimilated and rationalized (where possible) for the first time in twenty-five years. With the exception of the scheduled member section, it is *all* discussed and fully analyzed dispassionately, with both sides' arguments, or at least the best of them, being laid out for use by everyone. As prayed for earlier, all judges who cannot avoid adjudication of compensation claims should read and retain the black letter law and the many lessons compensation has to teach us contained in this single volume. If they do not, judges will see the volume quoted, misquoted, and plagiarized for decades to come. The analyses from both sides of every issue are that good.

The exhortations, prayers, and pleas of the work are concentrated in the lengthy discussions of the various issues of compensation law that the Mississippi Court of Appeals and Supreme Court have simply got wrong over the past seven years. The tone is from Professor Bradley's frequent observations at seminars and elsewhere to the effect that it is not asking too much to expect the Court to get it right. But rather than frontally assault the rulings that depart from precedent and the overall theory of compensation law, the authors are content to distinguish some of these rulings factually and thus create new exceptions to long-standing rules of construction. Even so, the analytical fallacies and faults of these new decisions are confronted in context, especially where lack of familiarity with critical compensation terms produces wrong results. Like Mark Twain said: "The difference between the right word and the almost right word is the difference be-

tween lightning and the lightning bug." Nowhere is that more true than in adjudicating compensation cases, for if the reviewing Court does not know the difference between "industrial" and "functional" and "occupational" disability, or if the Court ignores the "big picture" when applying political beliefs to plausible arguments from both sides, the critical context is lost and the result is hopelessly wrong.

To state the obvious: If the compensation system is worth saving, it is worth doing right. What these two highly accomplished authorities offer in the end is a way to get it right, every time. They bring clarity and illumination to a path once brightly lit but dimmed by tort reform and the politics of many passing moments. The whole concept of compensation for workplace injury and death has been victimized by every political upheaval over the last century and has survived solely because of the merit, justice, and workability of the system when effectively administered. The authors demonstrate that getting the answer to a compensation question wrong, for whatever reason, is one thing; trying to fit a wrong result or analysis in to our compensation law is another. Moreover, they show how to come to the right answer by utilizing the right analysis. That is simply a remarkable gift to all involved in the compensation system. If the historical purpose and intent of the compensation system matter still, Judge Thompson and Professor Bradley show *all* of us, no matter the "side" or political persuasion or prejudices one likes to embrace, how they can be achieved through decision-making that remembers the context of every disputed issue. With this volume, there honestly is no reason for anyone to wonder what the correct answer to a compensation question is, because it is all there. A commission or court may want the wrong answer, but to achieve it they will ask the wrong questions, and they cannot cite this treatise.

The great thing about compensation law is and has always been that it is ultimately knowable. All of it. With some time and dedication, anybody can learn compensation law from top to bottom, front to back, over the course of several months. And with that knowledge comes understanding and,

to some, understanding, empathy, and wisdom—well, maybe not *wisdom*. Our compensation belief is that the system works, and we know that because we understand every fact of it. The compensation bar in Mississippi is the fastest-growing and most active amalgamation of diverse interests that exists in law practice these days. Each of us has friends aligned with the other side who are now among our best friends. We disagree about a lot of things, including the "right" answer to some close questions of compensation law, but through the combat of a lot of cases we all recognize the objective truth of this volume: In the end, it is a statutory scheme we are applying to different facts, and we cannot do so with any consistency and fidelity unless we understand the intent, history, purpose, and context of the Act. We understand that the playing field is not level in compensation—it was never intended to be. Until one embraces that reality, one is not going to be an effective compensation professor, judge, advocate, adjuster, safety director, and on and on. We begin, and end, with the words and phrases of the Act itself. And when we lose through an honest application of the Act to the facts, we do not blame politics or bias or each other. We would not still be practicing compensation law if we didn't believe in the Act first and last. What Judge Thompson and Professor Bradley remind us is that the elegant simplicity and essential fairness in the whole idea of compensation of workers at the expense of the employer, and the merits of risk-spreading that is its fundamental justification, are worthy goals of our law, but to achieve them one must pay close attention.

Offerings of this sort are rare. Every practitioner, whether she specializes in compensation law or merely runs into compensation-related issues once every five years, should own *Mississippi Workers' Compensation*. Nothing else is necessary. More importantly, nothing else will do.

DAMAGES LAW FOR MISSISSIPPI TRIAL PRACTICE

Scranton Publishing (2006) – $298.00

Alysson Mills[*]

In recent years, Mississippi attorneys have benefited from a growing collection of practice guides and treatises on state law. Depending on their specialty, practitioners are by now familiar with such titles as *Mississippi Law of Torts*,[1] *Mississippi Workers' Compensation*,[2] and *Bell on Mississippi Family Law*.[3] John G. Corlew's recently published treatise, *Damages Law for Mississippi Trial Practice* (*Damages Law*),[4] is a welcomed addition to this growing collection and features a special bonus. In addition to its careful examination of tort damages law, it offers an exclusive compilation of all million-dollar verdicts in Mississippi state and federal courts—making it a potentially indispensable resource to practitioners whose research time is precious.

A seasoned trial attorney, Corlew brings his intimate knowledge of state law to his legal scholarship. He has authored pieces in the *Mississippi Law Journal*[5] and the *Mississippi Encyclopedia of Law*,[6] and in 1997 he published his

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[*] B.A., University of Mississippi, 2002; MPhil, Trinity College Dublin, 2005; J.D. Candidate, University of Mississippi, 2008.

[1] ROBERT A. WEEMS & ROBERT W. WEEMS, MISSISSIPPI LAW OF TORTS (2002).

[2] JOHN R. BRADLEY & LINDA A. THOMPSON, MISSISSIPPI WORKERS' COMPENSATION (2006).

[3] DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW (2005).

[4] JOHN G. CORLEW, DAMAGES LAW FOR MISSISSIPPI TRIAL PRACTICE, (Kathy K. Smith ed., 2006).

[5] John G. Corlew, *The Pursuit of Deep Pockets: An Historical Overview of Punitive Damages in Mississippi*, 63 MISS. L.J. 583 (1994).

[6] John G. Corlew & Leah D. McDowell, *Eminent Domain Law in* 4 ENCYCLOPEDIA OF MISSISSIPPI LAW 31 (Jeffrey Jackson & Mary E. Miller eds., 2005).

first treatise, *The Mississippi Jury: Law and Practice*,[7] which, as the name suggests, is a comprehensive compilation of constitutional, statutory, and case law relevant to the Mississippi jury process. In *Damages Law*, Corlew teams up with Kathy K. Smith, his law partner and editor, to produce an accessible guide for all damages issues arising in tort.

Corlew and Smith deliver a treatise that is narrow in scope, but that treats its primary subject with special attention. This distinguishes *Damages Law* from a similar title, *Mississippi Law of Damages*,[8] written by Johnny C. Parker, a professor at the University of Tulsa School of Law. To be sure, *Mississippi Law of Damages* is an all-inclusive treatise on state damages law, addressing damages issues not covered in *Damages Law*.[9] But its breadth may overwhelm practitioners whose most common damages questions arise in ordinary tort cases. By contrast, *Damages Law* is designed to give practitioners an in-depth analysis of issues arising exclusively in tort. Issues receiving individual chapters include: (1) allocation of fault, liability among tortfeasors, and application of settlement creditors; (2) attorneys fees and costs; (3) caps on compensatory damages; (4) causation; (5) emotional distress damages; (6) fraud damages; (7) jury instructions; (8) loss of consortium; (9) medical monitoring; (10) mitigation of damages; (11) new trial, additur, and remittitur; (12) physical injury damages; (13) prejudgment and post-judgment interest; (14) property damage; (15) punitive damages; (16) reputation damages; and (17) wrongful death damages.

Damages Law's chapters are designed to provide a start-to-finish analysis of their respective topics. In his own preface, Corlew quotes Oliver Wendell Holmes, Jr.: "In order to know what it is, we must know what it has been, and what it tends to become."[10] In this vein, Corlew commences each chapter

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[7] JOHN G. CORLEW, THE MISSISSIPPI JURY: LAW AND PRACTICE (1997).

[8] JOHNNY C. PARKER, MISSISSIPPI LAW OF DAMAGES (West 2003).

[9] Parker's *Mississippi Law of Damages* addresses damages relevant to claims arising in the context of business associations or under the Uniform Commercial Code, as well as damages relevant to condemnation or "takings."

[10] CORLEW, *supra* note 4, at *Preface* (quoting OLIVER WENDELL HOLMES, THE

with a short history that demonstrates the law's evolution and efficiently frames the subsequent discussion. In his introduction to punitive damages, for example, Corlew identifies the first Mississippi opinion to affirm an award of punitive damages (in 1854)[11] and then shows how punitive damages law evolved during the late nineteenth and early twentieth centuries with the rise of railroad cases.[12] He goes on to demonstrate how, since the emergence of bad faith insurance claims in the 1970s, the Mississippi Supreme Court has wrestled with standards by which to fairly assess punitive damages.[13] This brief history sheds light on the current law—specifically the punitive damages legislation of 1993, 2002, and 2004—all of which Corlew subsequently examines in depth.

Fittingly, each chapter concludes with a synopsis of case law addressing jury instructions relevant to the specific damages topic. In addition, a separate chapter addresses jury instructions generally[14] and offers "suggestions for jury instruction considerations,"[15] as opposed to model jury instructions, for the following specific damages issues: (1) general damages; (2) allocation of fault; (3) causation; (4) emotional distress damages; (5) fraud damages; (6) loss of consortium damages; (7) mitigation of damages; (8) personal property damages; (9) physical injury damages; (10) punitive damages (purpose and whether to award); (11) punitive damages (amount of award); (12) punitive damages (constitutional considerations); (13) real property damages; and (14) wrongful death damages.

Practitioners will appreciate *Damages Law*'s consistency in style, organization, and analysis. Corlew's language is plain and direct, reducing the use of pesky cross-references where possible. Information is delivered efficiently and methodically.

COMMON LAW 1 (Dover Publications 1991) (1881)).

[11] CORLEW, *supra* note 4, at 206 (citing Bell v. Morrison, 27 Miss. 68, 85 (1854)).

[12] *Id.* at 208.

[13] *Id.* at 212.

[14] *Id.* at 82.

[15] *Id.* at 88-108.

Each subtopic identifies the controlling law, provides authorities, and, where the law is unsettled, offers succinct words of advice. In his assessment of future pain and suffering damages, for example, Corlew writes that in the 1950s the Mississippi Supreme Court approved the "unit of time" formula for calculating damages.[16] He notes, however, that the Fifth Circuit has criticized the use of the formula in federal court, and has required that a court employing it provide a special cautionary instruction.[17] Corlew offers the following succinct advice: "Counsel using the argument would be wise to accompany the argument with the specific cautionary instruction required by the Fifth Circuit."[18]

Damages Law's comprehensive examination of tort damages law aside, what may be its real gem is its appendix. In two sections entitled, "Million-Dollar Verdicts," Corlew shares a compilation of all million-dollar verdict cases in Mississippi state and federal courts. The appendix lists the cases by court[19] and judicial district, and for each case provides: (1) the cause of action; (2) the damages awarded; (3) the county in which the trial was held; (4) the name of the presiding judge; and, (5) the case's history on appeal. There are nearly 300 cases, spanning more than three decades. Collecting these details was certainly an onerous task; the same research, even using online databases, would likely take weeks and miss unpublished cases. It is rare to find such a compilation in a legal treatise, and yet this kind of information has critical predictive value to practitioners (and assuredly to their clients), who may very well conclude that *Damages Law*'s appendix justifies its purchase.

Damages Law may be pricey even by legal treatises' standards—but in the practice of law, time is money. *Damages*

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[16] CORLEW, *supra* note 4, at 160 (citing Arnold v. Elis, 97 So. 2d 744, 747 (Miss. 1957); 4-Co. Elec. Power Ass'n v. Clardy, 73 So. 2d 144, 151 (Miss. 1954)).

[17] *Id.* at 160 (citing Westbrook v. Gen. Elec. & Rubber Co., 754 F.2d 1233, 1240 (5th Cir. 1985)).

[18] *Id.*

[19] Courts include federal courts and state circuit courts, chancery courts, and special courts of eminent domain.

Law's thoughtful organization, comprehensive explanations, and unique compilation of million-dollar verdicts make it a singular work on Mississippi tort damages law. Corlew and Smith have provided a reliable, one-stop resource for practitioners whose most common damages questions arise in ordinary tort cases and whose research time is precious. In short, practitioners may find *Damages Law* saves time, which saves money—making it a wise investment.

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